SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 24

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

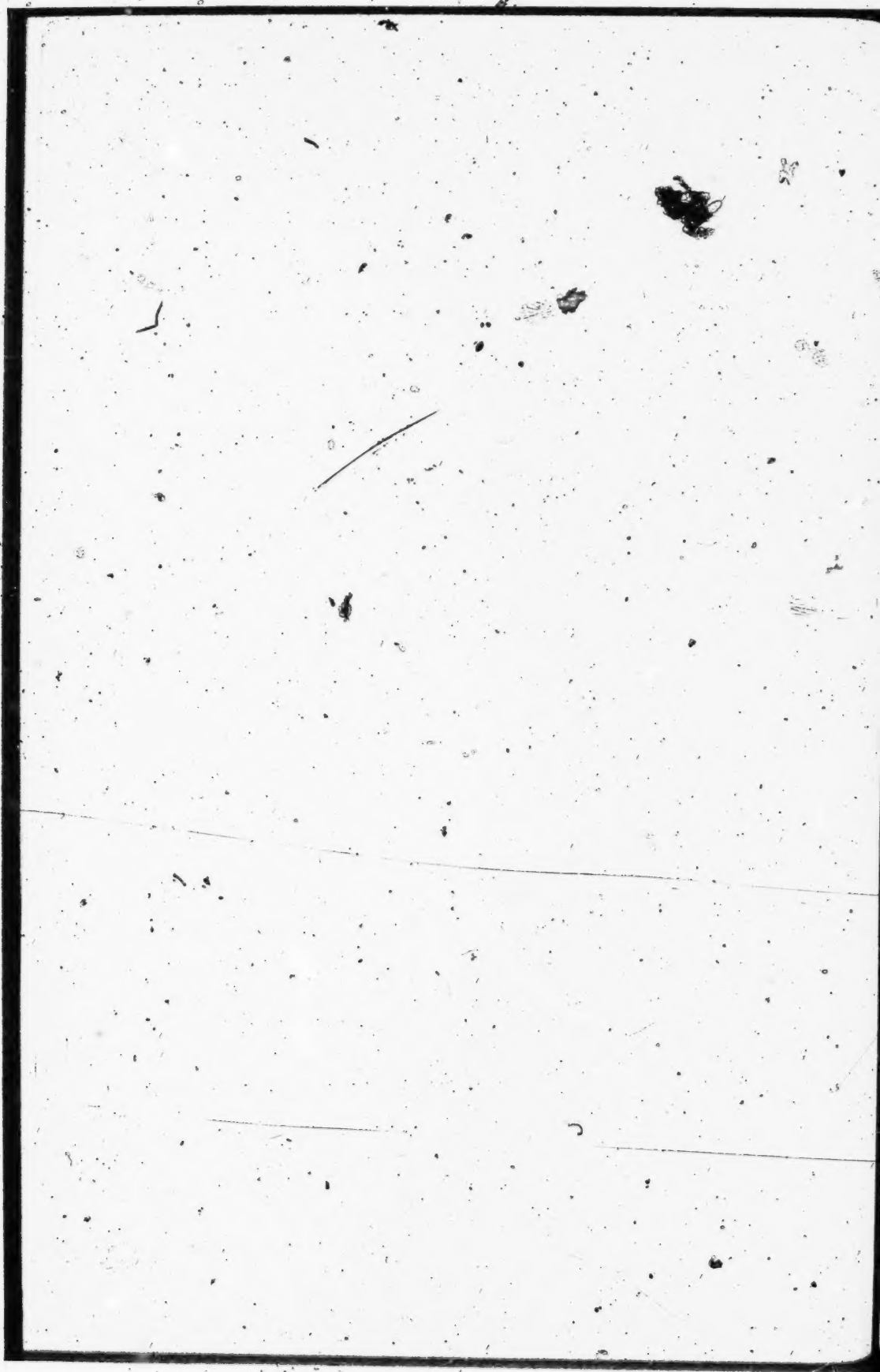
INDEX

	Original	Print
Proceedings in supreme court of Oklahoma	1	1
Petition in error, cause No. 23,342	1	1
Cross-petition in error, cause No. 23,342	4	3
Case-made from district court of Pawnee County, cause No. 8035	8	6
Proceedings before County Board of Equalization of Pawnee County	10	6
Return of personal property of Johnson Oil Co., as of January 1, 1931 (omitted in printing)	11	
Notice of proposed assessment	12	6
Response to proposed assessment	14	7
Agreed statement of facts	16	8
Testimony of G. C. Lilly	30	12
John Scheidel	43	22
George A. Mindeman	48	23
C. E. Davies (omitted in printing)	53	
Journal entry of judgment	55	25
Notice of appeal	58	27
Secretary's certificate (omitted in printing)	61	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1933

	Original	Print
Journal entry of judgment	63	29
Orders extending time (omitted in printing)	67	
Motion for new trial	71	32
Order overruling motion for new trial	73	32
Stipulation re case-made	75	33
Order settling case-made	76	34
Clerk's certificate (omitted in printing)	78	
Stipulation for consolidation of causes	79	35
Order of consolidation	80	36
Argument and submission (omitted in printing)	81	
Judgment	82	37
Opinion, Riley, J.	83	37
Petition for rehearing	89	42
Order denying petition for rehearing	98	46
Dissenting opinion, Swindall, J., on rehearing	99	46
Certificate of counsel	113	58
Application for stay of mandate	114	58
Order staying mandate	115	59
Petition for appeal and assignments of error	116	59
Order allowing appeal	121	62
Bond on appeal (omitted in printing)	123	
Acknowledgment of service	125	63
Citation and service (omitted in printing)	127	
Petition in error, cause No. 23,334 (omitted in printing)	142	
Case-made from county court of Osage County, cause No. 1575	147	64
Proceedings before county treasurer of Osage County	149	64
Notice of proposed assessment (omitted in printing)	151	
Objections to proposed assessment (omitted in printing)	153	
Order of assessment (omitted in printing)	158	
Notice of appeal (" " ")	160	
Bond on appeal (" " ")	163	
Certificate to transcript (" " ")	166	
Order setting cause (" " ")	169	
Statement of evidence	171	64
Caption (omitted in printing)	171	
Opening statements (omitted in printing)	173	
Testimony of G. C. Lilly	190	64
O. W. Campbell	211	68
G. C. Lilly (recalled) (omitted in printing)	227	
Exhibit 1—Statement as to tank cars (omitted in printing)	254	
Testimony of Homer Odell (omitted in printing)	268	
Exhibits 2 and 3—Judgments in Pawnee County cases (omitted in printing)	286	
Reporter's certificate (omitted in printing)	301	
Motion for new trial (omitted in printing)	305	
Order overruling motion for new trial (omitted in printing)	311	

	Original	Print
Journal entry of judgment.....(omitted in printing)	314	
Statement re contents of case-made (omitted in printing)	321	
Tender of case-made.....(omitted in printing)	322	
Acceptance of service.....(" " ")	322	
Stipulation as to case-made.....(" " ")	324	
Notice of settlement of case-made (omitted in printing)	326	
Order settling case-made.....(omitted in printing)	328	
Clerk's certificate.....(omitted in printing)	330	
Præcipe for record	331	73
Supplemental præcipe for record	333	74
Clerk's certificate.....(omitted in printing)	349	
Statement of points to be relied upon and designation of parts of record to be printed	350	75



[fol. 1] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23342

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PAWNEE, OKLAHOMA; The State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, Plaintiffs in Error,

vs.

JOHNSON OIL REFINING COMPANY, a Corporation, Defendant in Error,

or

In re Appeal in the Matter of the Assessment and Valuation of the Property of JOHNSON OIL REFINING Co., a Corporation

PETITION IN ERROR—Filed Feb. 4, 1932

Comes now the plaintiffs in error, appellants and represent and show to the court that heretofore, to-wit; on the 26th day of October, 1931, in the District Court of Pawnee County, Oklahoma, the District Court of Pawnee County, Oklahoma, rendered a judgment reversing and modifying the judgment of the Board of Equalization of Pawnee County, Oklahoma, in a certain action and proceeding, wherein there was involved the assessment of certain tank cars belonging to the Johnson Oil Refining Co., a corporation.

[fol. 2] The Johnson Oil Refining Co., a corporation, having filed its return of personal property with the county assessor of Pawnee County, Oklahoma, listing its property for the year 1931, and along with its other property it listed 64 tank cars at $500.00 per car, amounting to $32,000. Thereafter, and on June 24, 1931, the Board of Equalization of Pawnee County, Oklahoma, increased its assessment by adding 317 tank cars thereto and duly notified the Johnson Oil Refining Co. to appear before the Board of Equalization on July 8, 1931, and show cause why such assessment should not be so increased or adjusted. That, thereafter,

the Johnson Oil Refining Company filed its response, and the case was set down for hearing, and after various continuances, a decision was rendered by the Board of Equalization of Pawnee County, on July 28, 1931, increasing the number of said tank cars from 64 to 381, and thereby adding 317 tank cars and assessed the whole 381 tank cars at $500.00 per car, or at $190,500.00.

That an appeal was duly taken by the Johnson Oil Refining Company from the decision of the Board of Equalization of Pawnee County, Oklahoma, to the District Court of Pawnee County, Oklahoma, and the decision of the Pawnee County Board of Equalization was reversed and modified to the extent of holding that only 64 tank cars were assessable and taxable in Pawnee County, Oklahoma, at $32,000 for 1931, and not 381 tank cars at $190,500. That Pawnee County and the State of Oklahoma have appealed from the judgment of the District Court of Pawnee County, Oklahoma, to the Supreme Court of this State, and a certified transcript of the record and case made, duly certified and [fol. 3] attested is hereto attached and made a part hereof, and the plaintiffs in error allege that there is error in said record and proceedings in this, to-wit:

1st. That the court erred in overruling the motion of the Board of Equalization for a new trial.

2nd. That the court erred in holding that only 64 tank cars were assessable for taxation.

3rd. That the court erred in striking from the assessment 317 tank cars.

4th. That the court erred in not holding that the entire 381 tank cars were assessable for taxation for 1931.

5th. That the court erred in holding that the entire 381 tank cars were not assessable and taxable in Pawnee County for 1931:

6th. That the judgment is contrary to the law and evidence.

7th. That the court erred in reversing and modifying the judgment and decree of the Board of Equalization of Pawnee County, Oklahoma.

Wherefore Plaintiffs in Error pray that the judgment be reversed and this court render judgment holding that the whole fleet of 381 tank cars are assessable and taxable in Pawnee County, Oklahoma.

C. E. Mitchell, Co. Atty.; L. V. Orton, Attorneys for Appellant.

[fol. 4] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

CROSS-PETITION IN ERROR—Filed Feb. 11, 1932

Now comes Johnson Oil Refining Company, designated as defendant in error in the above entitled cause, and by this its cross petition in error, shows to the court that by virtue of a proceeding instituted before the Board of Equalization of the County of Pawnee, Oklahoma, and pending in the District Court of Pawnee County, Oklahoma, upon appeal from said County Board of Equalization, under the caption, "In the Matter of the Proposed Assessment and Valuation of Property of Johnson Oil Refining Company," No. 8035, a judgment was rendered on October 26, 1931, by the said district court as set out in the petition in error herein filed, and as shown by the original case-made and transcript of the proceedings in said cause in said district court in which said judgment was rendered, attached to and marked Exhibit "A" of the petition in error, and which is by reference made a part of this cross petition in error.

And the said Johnson Oil Refining Company avers that there is error in the said record of proceedings and in said judgment rendered against it, and from which defendant in error appeals, to-wit:

[fol. 5] 1. The judgment of said District Court of Pawnee County is contrary to law.

2. The court erred in not holding and deciding that the property assessed for taxation was taxable only at the domicile of its owner, to-wit, the State of Illinois, and in not holding and deciding that no part of same was taxable within the State of Oklahoma.

3. The judgment of the District Court of Pawnee County is not supported by the evidence which wholly fails to show

that the cars of Johnson Oil Refining Company, or any of said cars, were located and had an actual situs for taxation in Pawnee County.

4. The conclusion and judgment of the court that a portion of the tank cars of Johnson Oil Refining Company was subject to taxation in the State of Oklahoma and in Pawnee County, is contrary to law, in that said cars were, as shown by the evidence, property beyond the territorial jurisdiction of the State and that such judgment constituted a taking of the property of Johnson Oil Refining Company without due process of law, hence in violation of the Fourteenth Amendment to the Constitution of the United States.

5. The judgment of the court is contrary to the undisputed evidence, which established that the cars assessed were the property of a non-resident corporation, domiciled in the State of Illinois, used and employed by it in the transportation of merchandise in interstate commerce and in the course of its marketing business, conducted by, and from its office in the State of Illinois, and that said cars were only temporarily in Pawnee County and in the State of Oklahoma on such business, and have no abiding place therein.

[fol. 6] 6. The judgment of the court is contrary to law because the proof showed the cars assessed for taxation were only temporarily in the State of Oklahoma and in Pawnee County and upon interstate business, and that they had no location, or abiding place, therein, and had no actual situs for the purpose of taxation in said county and state, there being no statute of the state fixing a situs for such cars, or any portion thereof upon the basis of an average of such cars physically present in said Pawnee County, but were in transit therein in the conduct of interstate business.

7. The court erred in construction of the statute of Oklahoma providing for the taxation of all real and personal property in the state, and in holding and adjudging that the cars of Johnson Oil Refining Company were property having a situs in Pawnee County for the purpose of taxation within the meaning of said statutes, which said construction of the statute would render the same unconstitutional in that it would impute to the Legislature an

attempt to tax a non-resident's property outside the jurisdiction of the state, and in disobedience of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

9. The judgment of the court is contrary to law as neither the State of Oklahoma, as such, nor any of its political subdivisions or taxing districts, has the power or authority to tax the cars of Johnson Oil Refining Company, or any of them, which said cars were shown by the evidence to be only temporarily present in the state and for a purpose wholly inconsistent with an indefinite stay therein, to-wit, for receiving an interstate load of refinery products, remaining in said state for such purpose not more than twenty-four hours at a time, and coming into the state approximately only eighteen times, or eighteen days, in the course of one year, and consequently were constantly out of the state [fol. 7] for the remaining 347 days of the year, and the imposition of such tax is therefore without authority of law and amounts to the taking of property of Johnson Oil Refining Company without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

10. The court erred in failing and refusing to adjudge that the tank cars of Johnson Oil Refining Company were the property of a non-resident of the State of Oklahoma in transit in Pawnee County and therefore not subject to taxation in said state.

11. The court erred in holding, ruling and deciding that the Board of Equalization of Pawnee County had jurisdiction and authority to make an assessment for taxation, and to tax, the tank cars of Johnson Oil Refining Company upon the basis of a daily average number of its cars physically present in Pawnee County, Oklahoma and which cars were shown to be in transit in said county as vehicles of, and engaged in, interstate commerce.

Wherefore Johnson Oil Refining Company prays that said judgment be reversed and that it be restored to all things it has lost by reason thereof.

West, Gibson, Sherman, Davidson & Hull, McCullum & McCullum, Attorneys for Johnson Oil Refining Company.

[fols. 8-21] EXHIBIT "A"

IN DISTRICT COURT OF PAWNEE COUNTY, OKLAHOMA

No. 8035

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

Case-made—Filed Jan. 12, 1932; filed in Supreme Court Feb. 4, 1932

[File endorsement omitted.]

[fol. 22] Transcript of Proceedings Before the County Board of Equalization of Pawnee County, Oklahoma, in the Matter of the Proposed Assessment and Valuation of Property of Johnson Oil Refining Company

BEFORE COUNTY BOARD OF EQUALIZATION OF PAWNEE COUNTY

NOTICE OF PROPOSED ASSESSMENT

Pawnee, Okla., June 24th, 1931.

Johnson Oil Refining Company, Cleveland, Oklahoma:

You are hereby notified that the County Board of Equalization of Pawnee County, Oklahoma, by authority of Law, has adjusted your assessed valuation for 1931 Taxes as follows:

We have listed 381 tank cars at $700.00 per car, amounting to $266,700.00. This is in lieu of your listing of 64 cars at $500.00 per car, amounting to $32,000.00.

This adds 317 cars at $700.00 per car or $211,900.00 and adds $200.00 per car to the 64 cars you listed or $12,800.00 or a total raise in assessment of $244,700.00.

You may appear before said Board July 8, 1931, at the Court House in Pawnee, Oklahoma, and show cause why [fol. 23] such assessment shall not be increased or adjusted.

Pawnee County Board of Equalization. L. V. Orton, Chairman. George Baker, Member. D. B. Hollar, Member. C. E. Davies, Assessor. J. M. Perry, County Clerk.

[fol. 24] BEFORE BOARD OF EQUALIZATION OF PAWNEE COUNTY, OKLAHOMA

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

RESPONSE

To the Honorable Equalization Board of Pawnee County, Oklahoma:

The undersigned, Johnson Oil Refining Company, in response to your notice directed to it and bearing date of June 24th, 1931, files this its response to the proposed assessment of its property for the year specified in said notice, for the following reasons:

1. That it appears from the matters set forth in said notice, that your Honorable Board is without jurisdiction to hear and determine any questions involved therein, or to make said proposed assessment.

2. Because the said notice fails to describe the property proposed to be assessed and fails to mention the location thereof.

3. Because the undersigned is a foreign corporation, having its principal office in the State of Illinois, and that its moneyed capital invested in Oklahoma is represented by fixed tangible property in this State, and in the various counties thereof, which has been duly listed and returned for assessment and taxation in the counties where the same is taxable under the laws of the State.

4. Because the undersigned is a foreign corporation transacting business and owning property in various states of the Union, and that the Statute of Oklahoma authorizing a tax upon corporations upon the capital, surplus, and undivided profits does not apply to the undersigned which has paid all taxes imposed, levied, or assessed upon that portion of its property located in the State of Oklahoma, [fol. 25] and which property for the year 1931 has been duly listed and returned for assessment and taxation in the counties where the same is taxable under the laws of the State.

5. Because the undersigned does not have or own property in this State other than that which has been duly listed and returned for assessment and taxation in the counties of this State where the same is taxable under the laws of the State, and that it does not own any moneyed capital, surplus, or undivided profits in this State apart from the fixed property and assets located and remaining wholly within the State, which fixed property has been listed and returned for assessment and taxation in the counties where the same was taxable under the laws of the State.

6. Because the property mentioned in said notice is listed and returned for assessment and taxation in other states, and to assess and tax the same in the State of Oklahoma is double taxation.

7. Because the property mentioned in said notice is owned by a foreign corporation and is used in interstate commerce and is not located within the State of Oklahoma, and such property has no situs within the County of Pawnee, and is not subject to assessment and taxation by the State of Oklahoma, or any subdivision thereof.

Wherefore Johnson Oil Refining Company prays that this response be considered, and that such proposed assessment be disallowed and denied.

Johnson Oil Refining Company, by West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Its Attorneys.

[fol. 26] BEFORE BOARD OF EQUALIZATION OF PAWNEE COUNTY, OKLAHOMA

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY, said Proposed Assessment Being on 387 Tank Cars, the Property of JOHNSON OIL REFINING COMPANY, for the Year 1931

AGREED STATEMENT OF FACTS

This statement of facts is prepared and agreed to by and between C. E. Mitchell, County Attorney, Pawnee County, Oklahoma, representing Pawnee County, Okla-

homa, and A. A. Davidson and McCollum and McCollum, attorneys, representing Johnson Oil Refining Company, witnesseth:

It is agreed:

1st. That C. E. Mitchell is the duly elected, qualified and acting County Attorney of Pawnee County, Oklahoma, and is the attorney in this matter representing the interests of Pawnee County, before the Board of Equalization of Pawnee County, and as such county attorney, has full power to enter into this agreed statement of facts.

2nd. It is further agreed and stipulated that this agreed statement of facts, together with any oral testimony introduced herein by Johnson Oil Refining Company or Pawnee County, Oklahoma, at this hearing shall be considered as testimony and evidence given at this hearing and as such, shall constitute a part of the transcript of the pro-
[fol. 26½] ceedings at this hearing.

3rd. That this agreed statement of facts may be used by either the State of Oklahoma, or any subdivision thereof, particularly Pawnee County, or the said Johnson Oil Refining Company, in any proceedings before the said Board of Equalization, or any appeal taken therefrom the same as if such facts were testified to by witnesses, and both the County Attorney, C. E. Mitchell, and the attorneys for the said Johnson Oil Refining Company, agree to waive any and all objections based on incompetency, immateriality, or irrelevancy, it being agreed and understood that the said board of equalization, or any court to which these proceedings may be appealed, may consider this entire statement as evidence in the case.

4th. It is agreed that up to March 14th, 1931, the said Johnson Oil Refining Company was an Illinois corporation, domiciled in the State of Illinois, with its principal offices located in the City of Chicago; that since March 14th, 1931, said company has been a Delaware corporation, maintaining its principal office in the city of Chicago; that at no time has said company been a domestic corporation; that the said company owns and operates a crude oil refinery at Cleveland, Oklahoma; that the Cleveland refinery is the only refinery owned and operated by said company; that among other property owned by said company are three

hundred eighty-seven (387) tank cars; that said tank cars are used by said company in transporting refined products from the Cleveland refinery to the various points of delivery throughout the United States; that said cars are used in inter-state commerce, and none of said cars are employed wholly in intra-state; that in transporting the refined products from the Cleveland refinery, said cars may [fol. 27] enter any state in the Union, and frequently enter the following named states:

Arkansas, Colorado, Kansas, Michigan, Mississippi, Nebraska, North Dakota, Ohio, South Dakota, Wisconsin, Indiana, Iowa, Missouri, Louisiana, Illinois, and Oklahoma;

That said cars are sometimes loaded at refineries located in states other than Oklahoma, and the load transported in said cars to points of delivery, either in the state in which they are thus loaded, or other states. That in returning to Cleveland, Oklahoma, to be reloaded, said tank cars remain either on the private tracks of said company, or the tracks of the Missouri, Kansas and Texas Railroad Company, and remain on said tracks for a short period of time only, ranging from twenty-four (24) hours to about ten (10) days, depending upon the season of the year, and the volume of products handled out of the Cleveland refinery. That each of said cars make about one and one-half (1½) trips per thirty (30) days. That is, each car is loaded at the Cleveland refinery, sent to the point of delivery, returns to the Cleveland plant, is reloaded and sent out again to a point of delivery each thirty (30) days. That each car is out of Pawnee County and the State of Oklahoma from twenty (20) to twenty-nine (29) days out of each month; That with each shipment, through the bill of lading, the [fol. 28] consignee is instructed to return the car, when emptied, to Cleveland, Oklahoma, and all railroads handling said cars are instructed to return all empty cars to Cleveland, Oklahoma, unless otherwise specifically directed by the Johnson Oil Refining Company, which is sometimes done for the purpose of loading said cars at some other refinery, as hereinbefore stated. Said cars are repaired at Cleveland, Oklahoma, when such cars are repaired by the Johnson Oil Refining Company. That the daily average number of cars within Pawnee County during the years

1929 and 1930, was sixty-four (64), leaving a daily average of the total number of cars outside of Pawnee County during said time, three hundred twenty-three (323). In other words, about sixteen (16) per cent of the number of cars owned by said company, on a daily average, are in Pawnee County, and about eighty-four (84) per cent, on a daily average, are somewhere in transit outside of Pawnee County.

5th. That said tank cars are returned to Cleveland, Oklahoma, only for the purpose of reloading; that the Missouri, Kansas and Texas Railroad Company, in handling said cars, frequently places the empties on its own tracks; there they remain until called for by the Johnson Oil Refining Company, and when on the tracks of such railroad company, said cars are under the care and control of said railroad company, except such empty cars cannot be diverted from the service of the Johnson Oil Refining Company, and must be held by said railroad company subject to the needs of said refining company.

6th. That when a car is in transit and demands repair, the railroad company then handling such car makes the necessary repairs, sends the bill therefor to the Cleveland Office where it is approved or disapproved. If approved, [fol. 29] the bill is then transmitted to the Chicago office, out of which office the check or voucher is sent directly to the railroad company entitled to the same. Where the repair work is done by the Johnson Oil Refining Company at Cleveland, all bills for labor and material are approved by the Cleveland office, transmitted to the general office at Chicago, and the check or voucher mailed by the general office either to the Cleveland office for distribution, or directly to the person or concern furnishing such material or labor. That said company keeps and maintains at Cleveland, Oklahoma, a supply of repair materials, such materials, when purchased, are paid for out of the general office at Chicago, but the Cleveland office has the right and authority to use such materials as they deem necessary for the purpose of repairing said cars, and the Cleveland office has the right and authority to purchase such materials as said office deems necessary, either for immediate repair or for the purpose of placing in the warehouse. Provided, however, the payment of the same is made out of the

general office at Chicago, upon the request and approval of the Cleveland office.

7th. It is agreed that in returning empty cars, if the same are stopped short of Cleveland, Oklahoma, and placed on tracks at other points, such handlings of said cars is at the suggestion of the railroad company, and not the Johnson Oil Refining Company, and said cars are so handled solely for the convenience of said railroad company.

[fol. 30] Johnson Oil Refining Company introduced the following testimony:

(Mr. GARNETT C. LILLY, first witness, being duly sworn on oath to testify the truth, the whole truth and nothing but the truth, testified as follows:)

(Judge A. A. Davidson, one of the attorneys representing Johnson Oil Refining Company, questioned the witness.)

Q. State your full name.

A. Garnett C. Lilly.

Q. Where do you live, Mr. Lilly?

A. Chicago, Illinois. My residence is at 200 Wood Court, Chicago, Illinois.

Q. What, Mr. Lilly, is your connection with the Johnson Oil Refining Company?

A. I am Secretary and Treasurer.

Q. And have occupied that position for how many years?

A. Two years. Prior to that time I was, for thirteen years, Assistant Secretary.

Q. Mr. Lilly, up to March 14th, 1931, the Johnson Oil Refining Company was an Illinois corporation, was it not?

A. Yes, sir, up until March 14th, 1931, it was an Illinois corporation.

Q. Mr. Lilly, has it, the Johnson Oil Refining Company, surrendered its Illinois Charter?

A. All of the assets of the Illinois corporation have been transferred to a new corporation organized in Delaware, but the Illinois charter has not yet been surrendered.

Q. And that new corporation was incorporated March 14th, 1931, and has the same name as the old?

[fol. 31] A. Yes, sir.

Q. Up until March 14th, 1931, the principal office of the Johnson Oil Refining Company was in Chicago, Illinois?

A. Yes, sir.

Q. And that, Mr. Lilly, is still its main business office?

A. Yes, sir.

Q. And the business office of the new corporation?

A. Yes, sir, that's right.

Q. It has been stipulated here that the fleet of tank cars owned by the corporation are used in inter-state commerce and none of said cars are employed wholly in intra-state commerce. Now, Mr. Lilly, what would you say was the proportion of cars that might be used in shipping your gasoline in the same state?

A. In the same state?

Q. Yes, sir, in the State of Oklahoma.

A. A very small proportion, I would say.

Q. Well—just what proportion would you say?

A. I don't know. I do not have any figures that I could make an estimate—but just a very small proportion.

Q. All of the cars are employed in inter-state commerce, are they not, Mr. Lilly?

A. Yes, sir.

Q. Shipment to other states outside of the State of Oklahoma?

A. Yes, sir.

Q. Now, it has been stipulated also that in returning cars to Cleveland to be reloaded, they remain on the private tracks of your Company or on the tracks of the Missouri, Kansas and Texas Railroad for a short period of time. How long?

[fol. 32] A. Ranging from twenty-four (24) hours to about ten (10) days.

Q. Depending upon the season and the volume of business?

A. Yes, sir.

Q. Mr. Lilly, can you tell us how long they remain on your private tracks for reloading purposes?

A. Twenty-four (24) hours.

Q. That is to say, that when a car comes in on your private track for reloading purposes, it takes twenty-four hours to get out again?

A. Yes, sir.

Q. Are these cars, Mr. Lilly, necessary to the operation of your refinery?

A. No, sir.

Q. They are not, in any way, a plant facility?

A. No, sir.

Q. I take it that the company could lease cars for the purpose of shipping gasoline?

A. That's right.

Q. Your company is engaged in the marketing business also, is it not?

A. Yes, sir.

Q. Aside from the refining end?

A. Yes, sir, that's right.

Q. Are these cars used in the marketing business?

A. Yes, sir.

Q. Between states?

A. Yes, sir.

Q. Now, Mr. Lilly, how is your property taxed in the State of Illinois?

[fol. 33] A. Well—there are two systems of taxation. One, an ad valorem tax based on the value of the property and the other a capital stock tax.

Q. What is included in that capital stock tax? Just how is it?

A. A sum is assessed equal to the difference between the total of the capital and surplus account and the total of all ad valorem tax assessed values of physical properties in all states.

Q. Does your company pay taxes on the tank cars in other States of the Union?

A. Yes, sir.

Q. Do you know what States?

A. I think I can tell you the most of them. They are Missouri, Kansas, Wisconsin, Michigan, Indiana, Ohio, North and South Dakota, Nebraska, Colorado, Iowa, Mississippi and Arkansas.

Q. Louisiana?

A. We have been, but not recently.

Q. Including Illinois, of course?

A. Yes, Illinois, under the capital stock tax.

Q. Now, what is the basis of that tax you pay in the other states?

A. In all of the cases that have come to my attention, the tax is based on an ad valorem or value per car except in Minnesota and Wisconsin beginning with the year 1931.

Q. Based on what, Mileage?

A. Yes, the mileage travelled by the cars in these States is how they measure the number of cars in the State per year.

Q. So as I understand you then, that the taxes are assessed on the average cars in the state and not on the individual cars?

A. That's right.

[fol. 34] Q. Now, you say this mileage travelled is used to ascertain the average number of cars in the State?

A. Yes, sir.

Q. Please explain more fully.

A. For example, in the State of Nebraska, cars are said to make an average of 100 miles per day, that is one car is said to make that and the total mileage of all cars in that State divided by 100 would give the number of cars required to be in that State for one day. For ten days the annual tax would be 1/365ths of 10. That is for ten cars a day, not a year.

Q. Have they a definite system in Minnesota and Wisconsin?

A. In Minnesota, I think it was in 1926, they changed their law to a tax on the earnings of the cars in that State.

Q. And the taxes are paid on that basis?

A. The tax is paid by the railroads and held out of the mileage rents due us. Wisconsin has just passed a new law in 1931 taxing cars on that same basis.

Q. Heretofore, what was the system?

A. Ad valorem tax.

Q. Now, what kind of cars are these your company owns?

A. Steel tank cars. No insulated cars.

Q. How old are they?

A. Over ten (10) years, all of them.

Q. Now, Mr. Lilly, where are the repairs made on these cars?

A. Minor repairs are made at the plant in Cleveland, Oklahoma. Cars in transit, are repaired by the railroad companies when necessary.

Q. Is there a repair shop at Cleveland?

A. No.

[fol. 35] Q. Just ordinary repairs?

A. Yes, just ordinary side track repairs.

Q. When the cars need other repairs, where are they sent?

A. Usually to the Tulsa or Coffeyville, Kansas, shops of the North American Car Company.

Q. But as I understand you, these cars are constantly on the move?

A. Yes, sir, every day.

Q. They have no home or no locality?

A. No, sir.

Q. Is the Cleveland Refinery the only refinery that you own?

A. Yes, sir.

Q. Do you buy gasoline anywhere else?

A. Yes, sir.

Q. Is that also for inter-state shipment?

A. Yes, sir.

Q. Now, it is loaded then at Cleveland at your refinery and shipped out to whom?

A. A great majority of shipments are made to our own stations in States of Illinois, Indiana, Ohio, Missouri and Wisconsin.

Q. What do you mean by your own stations?

A. Bulk stations.

Q. Some, I take it then, are to customers and purchasers?

A. Yes, sir.

Q. And that is true with practically all of the cars that you own, is it not?

A. Yes, sir.

Q. When do the cars come back in your possession for loading purposes, on your private tracks?

A. Not until required.

[fol. 36] Q. When required, do you ask the railroad company to deliver you a certain specified number of cars?

A. Yes, sir.

Q. And these cars in the railroad's possession are strung our anywhere?

A. Right.

Q. Not your concern?

A. No, sir.

Q. Then, what railroad are your cars shipped on at Cleveland?

A. The Missouri, Kansas & Texas, exclusively.

Q. Now, as I understand it, your company pays taxes on all of its permanent and fixed property in Pawnee County?

A. We do.

Q. The tank cars are not a local investment, are they?

A. No, sir.

Q. You state that these cars do a marketing business as well as being used for shipments for your refinery. Explain what you mean by that.

A. Gasoline and other petroleum products are often purchased from other refineries and other cars sent to their plant for loading.

Q. You say there is just the one refinery. Have you any other?

A. Yes, a lubricating oil plant at Chicago Heights, Illinois.

Q. Are these same cars used for shipping purposes from your lubricating plant?

A. Yes, occasionally.

Q. Those shipments made outside the State of Illinois.

A. Yes, sir.

[fol. 37] Q. Do you know the value of the cars, Mr. Lilly?

A. I don't feel that I do.

Q. Have you sold any lately?

A. No, nor bought any.

Q. I believe that is all.

(Mr. C. E. Mitchell, County Attorney of Pawnee County, representing Pawnee County, cross-examines the witness, Mr. Lilly.)

Mr. Mitchell:

It is hereby stipulated and agreed that the following notation appears in the July, 1931, Official Railway Equipment Registry at page 970, among other statements:

"Total 387 cars; report mileage and movements to G. A. Mindeman, Traffic Manager, Cleveland, Oklahoma; send bills for repairs to cars and make remittances to the Johnson Oil and Refining Company, Cleveland, Oklahoma."

It is agreed that those statements are relative to the Johnson Oil Refining Company.

Q. Mr. Lilly, you have testified that your only refinery is at Cleveland, Oklahoma?

A. Yes, sir.

Q. And that you have 387 cars. Tank cars?

A. Yes, sir.

Q. Now, each one of those cars come to the refinery at Cleveland anywhere from four, to possibly fifteen times a year or more, on an average?

A. Yes, sir.

Q. Now, on all of your tank cars, they bear a marking which says in substance, 'When empty, return to Johnson Oil and Refining Company, Cleveland, Oklahoma'?

[fol. 38] A. Yes, sir.

Q. The Katy Railroad and your company, both, have some trackage at Cleveland?

A. Yes, sir.

Q. And during the slack season in your business, more cars are apt to be on the tracks in Cleveland than during the busy season?

A. No. The track storage is usually full every day.

Q. What is the track capacity in Cleveland?

A. About sixty-five (65) cars.

Q. That is, the Johnson Oil Refining Company load them?

A. Yes, sir.

Q. Now, you stated that some times you ship tank cars of lubricating oil from the Chicago plant?

A. Chicago Heights plant.

Q. That is a very rare instance?

A. Yes, sir.

Q. Are you acquainted with the repairing facilities that your Company have at Cleveland?

A. No, I can't say that I am qualified to explain that for certain.

Q. You do know, however, that some repairing is done at Cleveland?

A. Yes, sir.

Q. You do not at this time, pay any tax on your tank cars in Oklahoma?

A. No, sir.

Q. And have not?

A. No, not for several years.

Q. You don't keep any cars in Chicago, other — when you need them?

A. No, sir.

[fol. 39] Q. The cars are all billed back to Cleveland unless otherwise ordered to another point?

A. Yes, sir.

Q. Do you use any other cars other than your own in transporting your goods?

A. Yes, we use relief cars.

Q. How many?

A. From twenty-five to one hundred and fifty.

Q. Depending on the season of the year?

A. Depending on the season of the year and the volume to be moved.

Q. You purchase quite a bit of oil at Cushing, and load it from there?

A. We have done so in the past.

Q. You sometimes ship a load or a tank car of gasoline from the Cleveland plant to some other point within the State of Oklahoma?

A. Yes, sir.

Q. But you do not have any specified cars for that purpose?

A. No, sir.

Q. You do not have any other billings on your cars specifying the returning point other than the plant at Cleveland?

A. No, sir.

Q. I believe that is all.

(Mr. L. V. Orton, Chairman of the Equalization Board of Pawnee County, questions the witness, Mr. Lilly.)

Q. Mr. Lilly, in 1930, what valuation did any of the other States place upon any of these tank cars?

A. From six hundred to twelve hundred dollars per car.

[fol. 40] Q. Did you pay, in 1930, any ad valorem tax on any of these cars?

A. In any State?

Q. Yes, sir.

A. Yes, sir.

Q. I understood you to say that the other States handled them about the same way Nebraska did?

A. So far as the cases that have come under my knowledge they do with the two exceptions that I have given you. That being Minnesota and Wisconsin.

Q. Then Minnesota and Wisconsin made you pay in 1930, a regular ad valorem tax on some of these tank cars?

A. No, the Minnesota tax is a percentage or earnings based on the mileage travelled in that State in 1930. Assessment in Wisconsin is an ad valorem tax but they have changed their law, effective in 1931, to an earnings tax.

Q. Then it was Wisconsin that valued the sum six hundred to twelve hundred dollars for 1930?

A. No, the six-hundred valuation I gave you is placed on the cars by Arkansas; the twelve hundred valuation, by Nebraska, and other States range mostly between those two figures.

Q. So far, for the year 1931, you haven't paid any taxes on these tank cars, have you?

A. In other States?

Q. Yes, for the year 1931?

A. They are not assessable until the end of the year.

(C. E. Mitchell, County Attorney, again takes the witness.)

Q. Mr. Lilly, the State of Illinois does not levy an ad valorem tax on tank cars?

A. Not directly.

[fol. 41] Q. Do you know what license tax you pay in the State of Oklahoma?

A. Approximately eighteen hundred to two thousand dollars per year.

Q. You are referring to foreign corporations?

A. Yes, sir.

(Mr. L. V. Orton takes the witness.)

Q. Did you ever resist the payment of any of the taxes on the tank cars in other States upon the ground that they probably were taxable in Oklahoma?

A. No.

Q. Or any other State?

A. No.

Q. You did pay the State of Oklahoma, tax on these cars, didn't you?

A. Based on mileage and earnings.

Q. Up to when?

A. About four years ago. I think about that time.

Q. And the State Auditor is still insisting that you pay that tax?

A. No, sir.

Q. He is writing about it?

A. He sends us a bill occasionally.

(Judge A. A. Davidson questions witness.)

Q. This direction for the return of the cars is merely a standing direction to the railroads unless specific orders are given to divert the cars to some other place?

A. Yes, sir.

Q. The Johnson Oil Refining Company was in business [fol. 42] before the purchase of this refinery at Cleveland and had tank cars then?

A. Yes, sir.

Q. The County Attorney asked you if you kept any cars in Illinois?

A. Right.

Q. He asked you about a shipment—say from one point in Oklahoma to another point in Oklahoma of some products. That is just occasionally?

A. Occasionally.

Q. The cars, in fact, are used for inter-state shipments?

A. Yes, sir.

(It is agreed then that the table at the conclusion of Paragraph No. 10 of the Agreed Statement of Facts is a correct statement of the taxes paid in the various States referred to for the fiscal year- 1929 and 1930.)

State	Year	Amount
Arkansas	1929	$14.36
"	1930	8.56
Colorado	1929	12.01
"	1930	10.89
Kansas	1929	693.07
"	1930	719.82
Michigan	1929	185.59
"	1930	303.75
Mississippi	1929	.....
"	1930	13.57
Nebraska	1929	89.27
"	1930	84.55

State	Year	Amount
North Dakota	1929	.20
"	1930	1.56
Ohio	1929	167.08
"	1930	86.70
South Dakota	1929	4.21
"	1930	3.84
West Virginia	1929	.....
"	1930	3.05
[fol. 43] Wisconsin	1929	144.03
"	1930	170.75
Indiana	1929	254.01
"	1930	224.00
Iowa	1929	199.55
"	1930	167.80
Missouri	1929	548.05
"	1930	851.34
Louisiana	1929	2.87
"	1930	.....

(Mr. JOHN SCHEIDEL, next witness, is sworn on oath to testify the truth, the whole truth, and nothing but the truth.)

(Judge A. A. Davidson, one of the attorneys representing the Johnson Oil Refining Company, questions witness.)

Q. State your name, your full name, please.

A. John Scheidel.

Q. What is your business, Mr. Scheidel?

A. I am Superintendent of the North American Car Corporation.

* * * * * * *

[fol. 44] Q. Has your company made repairs on these cars?

A. I have repaired considerable Johnson cars.

Q. Where are the large repairs made?

A. Coffeyville, Kansas and Tulsa.

Q. No repair shop at Cleveland?

A. A repair shop to make what we call light repairs in order to take care of the safety required by the inter-state commerce commission.

Q. But not equipped to take care of all repairs?

A. No. No machinery. They can only drive a few rivets and tighten up bolts.

Q. Just a shipping point there?

A. All refineries have a few men at their loading tracks to make safety appliance repairs.

[fols. 45-47] Q. You stated that you had repaired several of the Johnson Oil Refining cars. Tank cars?

A. Yes, sir.

Q. Where do you send your bills for payment for repairs that you make on those cars?

A. Direct to Chicago.

Q. Do you send any bills to Cleveland?

A. No, sir.

Q. Where do you receive your check from?

A. Chicago.

Q. Who orders the repairs made?

A. The Traffic Manager at Cleveland, Oklahoma.

[fol. 48] (GEORGE A. MINDEMAN, next witness, sworn on oath to testify the truth, the whole truth, and nothing but the truth, testified as follows:)

(Mr. J. A. McCollum, one of the attorneys for Johnson Oil Refining Company, questions the witness.)

Q. State your name in the record, please.

A. George A. Mindeman.

Q. You are employed by the Johnson Oil and Refining Company?

A. Yes.

Q. In what capacity?

A. Traffic Manager.

Q. How long have you been employed in that line of the work?

A. Thirteen years.

Q. As traffic manager, is it your duty to supervise the movement of the tank cars in the usual course of the company's business?

A. Yes, sir.

Q. What per cent of the cars, if you know, is employed in interstate shipments or commerce?

A. I would say, about ninety-nine per cent.

Q. Leaving one per cent for intra-state shipments?

A. Yes, sir.

Q. Is there any one particular car or group of cars set aside for any particular shipments, either intrastate or interstate?

A. No, excepting that we have cars for gasoline loading, kerosene loading, cars for gas oil and fuel oil. You see we [fols. 49 & 50] can't interchange unless we clean them. For instance, if we have cars in fuel oil service and we wanted to use them for gas, we necessarily would have to first clean them.

Q. That classification of the cars has nothing whatever to do with the routing of the cars?

A. No, sir.

[fol. 51] Q. Now, the M., K. & T. Railroad Company does not have sufficient trackage in Cleveland to bring all the cars you have empty to come in?

A. They may and may not, depends on how our cars are rolling, and in what volume.

Q. Now the cars that you have on your trackage are under your direct supervision and control at Cleveland?

A. At Cleveland, yes.

Q. So far as routing is concerned?

A. That is right.

Q. And, as a matter of fact so far as Osage or Parsons, Kansas, is concerned, it would be immaterial to your company whether they were left on the siding at Parsons or Osage or brought down to Cleveland?

A. I don't quite understand you.

Q. In other words, as far as your company is concerned, it would be more satisfactory to your company to have the railroad to bring the cars right in Cleveland and keep them there for your immediate use than for some to be at Osage or Parsons and for you to have to order them?

A. Possibly, that is true.

Q. Of course, that pertains to the empty-s coming back to Cleveland?

A. Yes, sir.

Q. The full cars that happen to be on the sidings at Osage and Parsons are going out probably to some other States.

A. That is right.

Q. And it is your desire to get them to their destination as quickly as possible?

A. That is right.

[fols. 52–54] Q. So the cars that are on the sidings other than at Cleveland, they are more for the railroad's convenience than for your company?

A. That is right.

Q. If there were sufficient trackage of your company's, it would be the desire of the company to have all the empty-s sent directly to the plant at Cleveland so you would have them ready to use as they were needed?

A. I believe that is a fair statement.

Q. And the cars then that are on the sidings at Osage and Parsons are merely in transit either from your refinery or to the refinery?

A. Yes, sir.

Q. That is all.

(Mr. L. V. Orton takes the witness.)

Q. You don't direct the railroad company, do you, to store your cars at Parsons or Osage?

A. No, sir.

(Mr. C. E. Mitchell, County Attorney, again takes witness.)

Q. But if they are there then you order them as you need them?

A. We call them and tell them we want so many cars each day.

(Judge A. A. Davidson questions Mr. Lilly.)

Q. Mr. Lilly, in purchasing tank cars, where are they purchased?

A. In Chicago.

Q. All contracts for the purchase of tank cars are made in Chicago and paid for in Chicago?

A. Yes, sir.

Q. That is all.

(The evidence is closed on behalf of the Johnson Oil Refining Company.)

[fol. 55] BEFORE BOARD OF EQUALIZATION OF PAWNEE COUNTY, OKLAHOMA

In re Assessment of JOHNSON OIL REFINING COMPANY, a Corporation

JOURNAL ENTRY OF JUDGMENT—July 28, 1931

This matter coming on for hearing on the 24th day of June, 1931, wherein the Board of Equalization of Pawnee County, Oklahoma, had under consideration, the Tax Assessment, or return filed by the said Johnson Oil Refin-

ing Company, a corporation, for 1931, and on said date the number of tank cars belonging to said corporation, and listed in its assessment, was raised from sixty-four (64) tank cars to three hundred eighty-one (381) tank cars, and the valuation of the sixty-four (64) tank cars listed by said corporation as $500.00 per car to $700.00 per car, and 317 tank cars added by the Equalization Board was assessed at $700.00 per car, and due and legal notice was given to said Johnson Oil Refining Company, a corporation, and said corporation was ordered to show cause why the assessment as charged and raised by the Equalization Board should [fol. 56] not stand, and the matter was set for hearing for July 8th, 1931, and notice was duly given by mailing notices to the office of the corporation at Cleveland, Oklahoma, and notice given in person by J. A. McCollum, attorney for the corporation, in Pawnee, Oklahoma, and a notice mailed to the office of the said corporation in Chicago. That on said 8th day of July, 1931, the Johnson Oil Refining Company, appeared by its attorneys, McCollum & McCollum, filed its response, and by agreement, the matter was continued until the 25th of July, 1931, at 9 o'clock A. M. of said day.

On said 25th day of July, 1931, the matter came on for trial before the Board of Equalization of Pawnee County, Oklahoma. The Johnson Oil Refining Company was present by some of its officers, and by A. A. Davidson and J. A. McCollum, its attorneys, and Pawnee County was represented by C. E. Mitchell, County Attorney, and all parties announced themselves ready for the hearing. Whereupon the evidence was introduced by both sides, and by agreement, the testimony was taken down in shorthand by Gladys Lehew, a stenographer, to be transcribed and certified to by her. The evidence being completed, and the case argued by the attorneys, the case was taken under advisement until July 28th, 1931, when all the members of the Board of Equalization were present, and each side were represented by their attorneys, and the said Board being in regular session, the said Board of Equalization finds and decides that the said assessment, as given and filed by the Johnson Oil Refining Company, listing sixty-four (64) tank cars at $500.00 per car, should be raised to 381 tank cars, at $500.00 per car, so that the assessment of said Johnson Oil Refining Company, as to the 64 tank cars at $500.00 per car or $32,000.00, there is added 317 tank cars at

$500.00 per car or $158,000.00, so that the total assessment [fol. 57] of the tank cars of the said corporation is raised from $32,000.00 to $190,500.00.

The said Board finds that said corporation owns 381 tank cars and they are a part of the equipment of said Johnson Oil Refining Company and that their situs for taxation is in Pawnee County, Oklahoma, and that they are used in connection with its refinery at Cleveland, Oklahoma, for the purpose of shipping its refined products from Cleveland, Oklahoma, to various points in the United States.

It is therefore, by the Board of Equalization, ordered and adjudged that the assessment of said Johnson Oil Refining Company, a corporation, be raised from 64 tank cars to 381 tank cars, and that it be assessed for taxation on 381 tank cars at $500.00 per car, or $190,000.00, for the fiscal year beginning July 1st, 1931, and ending June 30th, 1932, on said tank cars.

To the above, the Johnson Oil Refining Company excepts, and gives notice of its intention to appeal to the District Court of Pawnee County, Oklahoma.

L. V. Orton, Chairman of the Board of Equalization, Pawnee County, Oklahoma.

[fol. 58] BEFORE EQUALIZATION BOARD OF PAWNEE COUNTY

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

NOTICE OF APPEAL

To L. V. Orton, Chairman of the Board of Equalization of Pawnee County, Oklahoma; C. E. Davies, County Assessor of Pawnee County, Oklahoma; J. M. Perry, County Clerk of Pawnee County, Oklahoma, and C. E. Mitchell, County Attorney of Pawnee County, Oklahoma:

You, and each of you, are hereby notified that the Johnson Oil Refining Company intends to, and does hereby, appeal from the decision of the Equalization Board of Pawnee County, Oklahoma, rendered July 28th, 1931, to the district court of Pawnee County, Oklahoma, in which decision the board held that three hundred eighty-one (381) tank cars owned by the Johnson Oil Refining Company are taxable in Pawnee County for the year 1931, and held [fol. 59] that such tank cars should be assessed at $500.00 each.

You are further notified that the Johnson Oil Refining Company appeals from such decision for the reasons and on the grounds, as follows, to-wit:

1. That the Equalization Board is without jurisdiction to hear and determine any question involved in these proceedings, and is without jurisdiction to make said assessment.

2. Because the Johnson Oil Refining Company is a foreign corporation having its principal office in the State of Illinois, and because said company's moneyed capital invested in Oklahoma is represented by fixed tangible property in Oklahoma, and in the various counties thereof, which property has been duly listed and returned for assessment and taxation in the counties where the same is taxable under the laws of the state.

3. Because the Johnson Oil Refining Company is a foreign corporation transacting business and owning property in various states of the Union, and that the Statute of Oklahoma authorizing a tax upon corporations, upon the capital, surplus, and undivided profits, does not apply to the undersigned, which has paid all taxes imposed, levied, or assessed upon that portion of its property located in the State of Oklahoma, and which property, for the year 1931, has been duly listed and returned for assessment, and taxation in the counties where the same is taxable under the laws of the state.

4. Because the Johnson Oil Refining Company does not have or own property in this state other than that which has been duly listed and returned for assessment and taxation in the counties of this state where the same is taxable under the laws of the state, and said company does not own any moneyed capital, surplus, or undivided profits in this state apart from the fixed property and assets located and remaining wholly within the state, which fixed property has been listed for assessment and taxation in the counties where the same is taxable under the laws of the state.

5. Because the tank cars sought to be assessed by said Equalization Board are listed and returned for assessment and taxation in other states, and to assess and tax the same in the State of Oklahoma is double taxation.

6. Because the tank cars sought to be assessed and taxed by said board are owned by a foreign corporation and are used in interstate commerce, and are not located within the State of Oklahoma, and enter Pawnee County only in [fols. 60–62] transit, and such property has no situs within the county of Pawnee, and is not subject to assessment and taxation by the State of Oklahoma, or any sub-division thereof.

7. That said tank cars are not commingled with other personal property in the state; that each car is separately and specially numbered and lettered, so that its identity is at all times fixed and determinable; that the Johnson Oil Refining Company asserts that none of said tank cars are subject to assessment and taxation in Pawnee County.

Wherefore Johnson Oil Refining Company prays that the attempted assessment of said tank cars by the Board of Equalization of Pawnee County, be set aside and held for naught.

Johnson Oil Refining Company, by West, Gibson, Sherman, Davidson & Hull and McCollum & McCollum, Its Attorneys.

Service of the foregoing notice accepted this 1st day of August, 1931.

L. V. Orton, Chairman Board of Equalization of Pawnee County, Oklahoma. C. E. Davies, County Assessor, Pawnee County, Oklahoma. J. M. Perry, County Clerk of Pawnee County, Oklahoma. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma.

[fol. 63] IN DISTRICT COURT OF PAWNEE COUNTY, OKLAHOMA

No. 8035

In re Assessment of Property of JOHNSON OIL REFINING COMPANY

JOURNAL ENTRY OF JUDGMENT—Oct. 26, 1931

Now, on this 26th day of October, 1931, the same being a regular court day of the September, 1931, term of the above court, this matter coming on before me, Thurman S.

Hurst, a Judge of the above District Court, on the transcript of proceedings before the County Board of Equalization of Pawnee County, Oklahoma, made as provided by law, and upon the issues of law arising thereon, and the court having heard the arguments of counsel, and being fully advised in the premises, concludes and holds that the objection of Johnson Oil Refining Company to the assessment of said cars insofar as three hundred seventeen of the total number of cars, should be sustained; that said three hundred seventeen cars did not acquire a situs in [fol. 64] the State of Oklahoma, and are not subject to taxation in Pawnee County, or in the State of Oklahoma, and that such taxation would be an interference with interstate commerce, and that it would amount to a talking of said property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

The court further concludes and holds that the objection of Johnson Oil Refining Company to said assessment should be denied insofar as sixty-four of said cars is concerned, and concludes and holds that said sixty-four cars, being the average number present in Pawnee County, Oklahoma, on any one day during the year 1930, and being the number of said cars listed by Johnson Oil Refining Company for taxation in Pawnee County, Oklahoma, for the year 1931, was property in the State of Oklahoma, and in Pawnee County, and within the purview of the statute providing for the taxation of all personal property within the state, not exempt by law, and that said number of cars had a situs in Pawnee County, Oklahoma, and were taxable in said county.

It is therefore considered, ordered and adjudged by the court that the action of the Board of Equalization of Pawnee County, in assessing the tank cars of Johnson Oil Refining Company be, and the same is hereby annulled and set aside, insofar as said assessment relates to an excess of the number of said cars over sixty-four, and the assessment made by said County Board of Equalization is hereby modified so that said assessment shall be, and be spread on the assessment roll of Pawnee County, in the sum of Thirty-two Thousand ($32,000.00) Dollars, instead of One Hundred Ninety Thousand ($190,000.00) Dollars, to-wit: on sixty-four cars at a value of $500.00 each.

[fol. 65] Johnson Oil Refining Company excepts to the ruling and judgment of the court, that the daily average number of its cars present in Pawnee County, Oklahoma, during the year 1930, are taxable by said Pawnee County, and gives notice in open court of its intention to appeal therefrom.

The County Attorney of Pawnee County, Oklahoma, excepts, on behalf of the State of Oklahoma, and Pawnee County, Oklahoma, to the ruling and judgment of the court, that the number of cars belonging to Johnson Oil Refining Company in excess of sixty-four cars, have no situs for taxation in the State of Oklahoma, and that such taxation would be in violation of the Fourteenth Amendment to the Constitution of the United States, and gives notice in open court of the intention of said State of Oklahoma, and Pawnee County, to appeal from such judgment.

Upon the request of the parties the court clerk is directed to enter said notice of appeal upon the proper docket in accordance with the statutes in such cases made and provided for.

And for good cause shown, each of the parties hereto are given and granted an extension of thirty days from this date to make, and serve, for appeal, a record and case-made of the proceedings and judgment herein, upon the opposing party, who shall have ten days after service thereof to suggest amendments thereto, said case-made to be settled and signed upon five days' notice by either party.

It is further ordered by the court that said judgment be, and the same is hereby stayed and superseded pending the perfection of an appeal, by either party, and thereafter [fols. 66-70] until said appeal is finally determined.

Thurman S. Hurst, Judge of the District Court.

Filed in the District Court of Pawnee County, Oklahoma, Nov. 28, 1931.

Jos. D. Soulsby, Court Clerk, by Ethel Traver, Deputy.

Which said proceedings were entered upon the minute book of the Court Clerk by direction of the Court in said cause, to-wit:

* * * * * * *

[fol. 71] IN DISTRICT COURT OF PAWNEE COUNTY

No. 8035

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

MOTION FOR NEW TRIAL—Filed Oct. 29, 1931

Comes now the Board of Equalization of Pawnee County, Oklahoma, the Appellee herein and moves the Court to vacate and set aside the decision of the Court and judgment rendered herein on the 26th day of October, 1931, and to grant a new trial on the following causes which affect materially the substantial rights of said Appellee.

1st. That the decision and judgment is not sustained by sufficient evidence and is contrary to the evidence.

2nd. That the decision and judgment is contrary to law.

3rd. That the decision and judgment is contrary to the law and the evidence.

4th. That the court erred in failing to adjudge that all of the 381 tank cars were taxable by Pawnee County, Oklahoma.

C. E. Mitchell, County Attorney, Pawnee County, Oklahoma; Lewis Raba, Assistant County Attor-
[fol. 72] ney, Pawnee County, Oklahoma, Attorneys for Appellee.

[File endorsement omitted]

[fol. 73] IN DISTRICT COURT OF PAWNEE COUNTY, OKLAHOMA

No. 8035

In re Assessment of Property of JOHNSON OIL REFINING COMPANY

ORDER OVERRULING MOTION FOR NEW TRIAL—Filed Nov. 28, 1931

Now on this 27th day of November, 1931, this matter comes on for hearing on the motion of Pawnee County Equalization Board for a new trial.

The court finds that the motion for a new trial should be overruled.

It is therefore, by the court, ordered, adjudged and decreed that the motion for a new trial filed by the Pawnee County Board of Equalization should be and the same is hereby overruled, to which ruling the Board of Equalization, the County Attorney on behalf of the State of Oklahoma and Pawnee County excepts, and gives notice of its intention to appeal to the Supreme Court of Oklahoma, and the court orders that such notice of appeal shall be entered by the Court Clerk on the proper Docket.

It is further ordered that an extension of time is hereby granted of thirty-seven days to make and serve a case-made [fol. 74] upon the Johnson Oil Refining Company, and said Johnson Oil Refining Company is given ten days thereafter to suggest amendments thereto, the same to be signed and settled within five days thereafter, upon written notice.

Thurman S. Hurst, Judge.

[File endorsement omitted]

[fol. 75] IN DISTRICT COURT OF PAWNEE COUNTY, OKLAHOMA

No. 8035

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

STIPULATION AND AGREEMENT OF COUNSEL

It is stipulated and agreed by and between the parties hereto that the foregoing case-made contains a full, true, complete and correct copy of the transcript of the proceedings had before the County Board of Equalization of Pawnee County, Oklahoma, and of the notice of appeal therefrom, and is a full, true, correct and complete copy of the transcript and of the proceedings in the District Court of Pawnee County, Oklahoma, on appeal, including all the evidence submitted, all motions and rulings made, the judgment in said cause, all exceptions allowed, all orders in said cause and all of the record upon which the judgment and journal entry in said cause was made; that

each party waives the right to formal service of said case-made, and the right to suggest amendments thereto, and waives all notice of the time and place for the settlement and signing thereof, and do hereby consent that the same may be settled immediately and without notice.

C. E. Mitchell, County Attorney, Pawnee County, Oklahoma; L. V. Orton, Special Counsel. McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull, Attorneys for Johnson Oil Refining Co.

[fol. 76] IN DISTRICT COURT OF PAWNEE COUNTY, OKLAHOMA

No. 8035

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

ORDER SETTLING CASE-MADE

I, the undersigned, Judge of the District Court within and for the County of Pawnee, State of Oklahoma, do hereby certify the foregoing presented to me as a case-made in the action above entitled, and as a full, true, complete and correct copy of the transcript of the proceedings had before the County Board of Equalization of Pawnee County, Oklahoma, and of the notice of appeal therefrom, and a full, true, complete and correct copy and transcript of all the proceedings in the District Court of Pawnee County, Oklahoma, on appeal from said County Board of Equalization, including all the evidence submitted, all rulings made, the judgment in said cause, and all exceptions allowed, all orders in said cause and all the record upon which the judgment and journal entry in said cause was made; that at the time of the presentation of said case-made to me for signing and settlement, there appeared counsel for the respective parties, to-wit, for the State of Oklahoma, C. E. Mitchell, County Attorney of Pawnee County, and L. V. Orton, special counsel, and for Johnson Oil Refining Company, J. A. McCollum and A. A. Davidson, and by and between whom it was agreed that the case-made presented [fol. 77] was a true, full and correct record and transcript of the proceedings in said cause, and of the record upon

which the judgment of the court was made, and agreed that the said case-made might be settled and signed without further notice or proceeding; and, having examined the same, I do now settle and sign the same, as a true, complete and correct case-made in the above entitled cause, and I do hereby direct that it be attested, and filed, by the Court Clerk.

Witness my hand at Pawnee, Pawnee County, Oklahoma, this 12th day of January, 1932.

Thurman S. Hurst, District Judge.

Attest:

Jos. D. Soulsby, Court Clerk, by Ethel Traver, Deputy. (Seal.)

[fol. 78] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 79] IN SUPREME COURT OF OKLAHOMA

No. 23218

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

No. 23219

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

No. 23334

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

No. 23342

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PAWNEE, OKLAHOMA; The State of Oklahoma ex Rel., C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, Plaintiffs in Error,

vs.

JOHNSON OIL REFINING COMPANY, Defendant in Error

STIPULATION FOR CONSOLIDATION—Filed Feb. 11, 1932

It is hereby stipulated and agreed by and between the undersigned, subject to the order of the court, that the foregoing entitled and numbered causes may be consoli-

dated in this court for the purpose of briefing and argument, in as much as each of them involves the same property, to-wit, property of Johnson Oil Refining Company, and presents the question of its taxability, and the right to assess the same for ad valorem taxation by local assessment and taxing officers within the State of Oklahoma.

West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Attorneys of Record for Johnson Oil Refining Company. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma. C. K. Templeton, by Leander Hall, Asst. County Attorney of Osage County, Oklahoma. John R. Pearson, of Special Counsel for Osage County, Oklahoma, in Cause #23334. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma.

[File endorsement omitted.]

[fol. 80] IN SUPREME COURT OF OKLAHOMA

23218, 23219, 23334, 23342

[Titles omitted]

ORDER OF CONSOLIDATION—Feb. 16, 1932

And now on this day it is ordered by the court that the stipulation of all parties to consolidate the four foregoing causes, be, and the same is hereby approved.

[fol. 81] Minute entry of argument and submission, December 13, 1932, omitted in printing.

[fol. 82] IN SUPREME COURT OF OKLAHOMA

23334

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

23342

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PAWNEE, OKLAHOMA; The State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, Plaintiffs in Error,

vs.

JOHNSON OIL REFINING COMPANY, Defendant in Error

JUDGMENT—Dec. 20, 1932

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed and the cause remanded,

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed and the cause remanded with directions to proceed consistent with the opinion filed therein.

Opinion by Riley, J.

[fol. 83] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Pawnee County, State of Oklahoma

Honorable L. N. Kinerey, Judge

Affirmed

No. 23219

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Pawnee County, State of Oklahoma

Honorable L. N. Kinerey, Judge

Affirmed

No. 23342

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

Error from the District Court of Pawnee County, State of Oklahoma

Honorable Thurman S. Hurst, Judge
Reversed and Remanded

No. 23334

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Osage County, State of Oklahoma

Honorable Henry Wood, Judge

Reversed

Syllabus

Where tank cars are owned by a refining company incorporated in a foreign state, but authorized to do business in this State, it having but one refinery and that located in this State and such tank cars are used by such company to transport refined products in intrastate and interstate commerce and all of such cars are returnable when empty to the refinery, all such cars are taxable as personal property of such corporation in the county where such refinery is located. None of such cars are taxable in another county merely because some of such cars are temporarily within such other county.

C. E. Mitchell, County Attorney of Pawnee County; Ed Waite Clark, P. E. Rowe, R. K. Robertson for Pawnee County.

[fol. 84] C. K. Templeton, County Attorney of Osage County; Leander Hall, Frank T. McCoy, John R. Pearson, John T. Craig for Osage County.

Chas. Y. Freeman, McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull for Johnson Oil Refining Company.

[fol. 85] OPINION—Filed Dec. 20, 1932

RILEY, J.:

Causes #23,218, and #23,219, originated in the County Treasurer's office of Pawnee County. They were begun by the Tax Ferret. Appeals were taken to the County Court and tried there by stipulation upon the same evidence. The appeals here are separate. The County Court directed the entry upon the tax rolls of the taxable value of 380 tank cars owned by the Johnson Refining Company for the years 1925-28, inclusive. The taxable situs was found to be at Cleveland, Pawnee County, Oklahoma. From the County Court appeals were perfected to this Court.

Cause #23,342, originated in the Board of Equalization of Pawnee County. The Johnson Refining Company had listed for taxation for the year 1931, tank cars in the number 64. The Board upon notice assessed 381 such cars. The refinery appealed to the district court where a judgment was entered directing the taxation of what was found to be the average number of tank cars (64) situated in the County during the year. From that judgment both the County and the taxpayer have appealed to this Court.

These tank cars are engaged in inter-state and intra-state commerce. By the use of them the Johnson Oil Refinery Company transports refined petroleum products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this State. Occasionally the refinery purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked: "Johnson Oil Refining Company, Cleveland, Oklahoma", or "when empty return to Johnson Oil Refining Company, Cleveland, Oklahoma". The empty cars are, unless diverted by special

order, as aforesaid, returned to Cleveland. Repair trackage is maintained at Cleveland. This accommodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other track- [fol. 86] age at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. This company is incorporated under the laws of Illinois and maintains an office at Chicago, but no trackage for the cars is there. Cleveland is the one place where the company always has use for these cars. All of these cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products seems to be the result of sales contracts made from the office at Chicago. O. C. Goward is the Superintendent of transportation for the refinery whose location is Cleveland. The Cleveland office had control and supervision of these acrs (R. p. 34, Cause #23,342). Empty cars are stored at Osage, Osage County, Oklahoma, and Parsons by the railroad company when congestion occurs, they are subject to order and return to Cleveland when needed. The need is communicated to the railroad each day (R. P. 35, Cause #23,342). No tax is paid on these cars in Oklahoma, and no ad valorem tax is paid upon them in Illinois (R. p. 4, Cause #23,342).

Section 9574, C. O. S. 1921, provides:

"All property in this state, whether real or personal, including the property of corporations, banks and bankers except such as is exempt, shall be subject to taxation."

A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that despite the fact it listed for taxation in Pawnee County, 64 cars during one of the years it is not estopped to deny taxation in toto. It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation possesses but one refinery. It is located at Cleveland. In [fol. 87] our opinion the taxable situs is there. Travis v.

Dickey, 96 Okla. 256, 222 P. 527; State v. Timbrooks's Est., 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Oklahoma. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. Gulf Ref. Co. v. Tillinghast, 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute "property within this State". They are merely temporarily absent at times from the Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars are taxable in Pawnee County. Williamson v. Prairie Cattle Co., 5 Okla. 497.

The judgments of the County Court are affirmed.

There is no law authorizing a tax based upon an "average number" of cars present on a given day at any one taxable point, and there was no application of that principle by administrative officers.

The judgment of the District Court is erroneous as a matter of law. It is reversed with directions to render judgment directing a listing for taxation of the entire number of the tank cars that have their base for operations within Pawnee County for the years involved.

There is another case herewith presented and considered on oral argument. It comes from Osage County and is styled and numbered, In the Matter of Assessment of Omitted Property of Johnson Oil Refg. Co., #23,334. Therein Osage County is claiming the right to collect taxes upon 50 of the cars already considered. The judgment therein was based upon an "average number theory" and predicated upon the presence of that number of these cars upon the railway siding in possession of the railroad, subject to call from the refinery at Cleveland. In our opinion these cars did not have a permanent abiding place within Osage County, and were not subject to taxation elsewhere [fol. 88] than in Pawnee County.

The judgment in that cause is reversed with directions to dismiss the action.

Clark, C. J.; Hefner, Cullison, Swindall, McNeill, Kornegay, JJ., concur.

Lester, C. J.; Andrews, J., Abent.

[fol. 89] [File endorsement omitted]

[fol. 90] IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

[fol. 91] PETITION FOR REHEARING—Filed Jan. 14, 1933

Now comes Johnson Oil Refining Company and respectfully petitions the court to grant a rehearing in the above entitled causes, and as grounds therefor the petitioner says:

I

The court has overlooked the controlling effect of a fundamental principle of taxation, applicable to the facts of record, viz., that the right of a state, or municipality, to tax depends upon, and is measured by, its ability to give the protection of its laws to the property taxed, taxation and protection being reciprocal.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194;
Cooley on Taxation, Vol. 1, p. 83;
Webster v. City of Fargo, 82 N. W. 732;
Rolph v. City of Fargo, 76 N. W. 242;
Williams v. Detroit, 2 Mich. 560;
Mobile v. Baldwin, 51 Ala. 61;
Chicago & Northwestern R. R. Co. v. State, 108 N. W. 557;
Cooley's Constitutional Limitations (4th ed.), p. 617.

It is upon this principle that the cars of Johnson Oil Refining Company, engaged in the business of their owner in other states, are taxed there, proportioned to the bene- [fol. 92] fits accorded them while in such states on such business.

American Refrigerator Transit Co. v. Hall, 174 U. S. 70;
Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18;
Union Refrigerator Transit Co. v. Lynch, 177 U. S. 194;
Gray on "Limitations of the Taxing Power", p. 59;
Keith Ry. Equipment Co. v. Board of Review, 119 N. E. 302.

Upon the foregoing principle:

(a) The admitted use, and the continuous presence, of the major part of the cars, at all times, in other states, and on business which makes such continued use and employment necessary in the free conduct of that business, precludes the possibility of an actual situs for the entire fleet in Pawnee County, or at any one place.

(b) Because of the uncontroverted fact that more than 300 cars of the fleet are continuously absent from the state (not the identical cars, but on an average), engaged in a distinct and separate business from the operation of the refinery, the State of Oklahoma cannot afford the protection of its laws to such cars, the same being subject to the laws of other states in which they are transacting the business of their owner.

[fol. 93] The fleet of cars cannot therefore be taxed as a whole, as was done by the taxing authorities of Pawnee County, on the basis of an actual situs there, because the fleet as a whole was never in Pawnee County or in the state, and therefore such a tax is not only unequal and double taxation, but amounts to a taking of private property without just compensation and to a taking of property without due process of law, and deprives Johnson Oil Refining Company of the equal protection of the law, which constitutional guaranties petitioner has at all times invoked in respect to the taxes assessed against its said property.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341;
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226;
Frick v. Pennsylvania, 268 U. S. 473;
Louisville Ferry Co. v. Kentucky, 188 U. S. 385;
Union Transit Co. v. Kentucky, 199 U. S. 194.

II

The conclusion of the court overlooks the uncontradicted and fundamental fact that the main and principal business of Johnson Oil Refining Company is the marketing of refinery products in interstate commerce, and not, as the opinion indicates, the operation of the refinery at Cleve-
[fol. 94] land, the refinery being a distinct entity and but one of the sources of the commodities dealt in and sold

in interstate commerce, which, though taxable as a separate entity because of its location, is an adjunct to the main business in which the company makes its profits.

In arriving at its conclusion the court has overlooked the evidence that the same cars are used also in the transportation of refinery products from other refineries as well as from the refinery at Cleveland, and that they are used in the transportation of the products of the company's lubricating plant at Chicago Heights, as well as transporting gasoline from its bulk stations located in several states (C-m. 23328, p. 19).

It also overlooks the evidence that the cars are an investment in the marketing business, not in the refinery (C-m. 23342, p. 19).

It has also overlooked the testimony that no cars were allotted to the refinery, but were in fact used generally, and without discrimination, in the company's marketing business (C-m. 23334, p. 58).

It has overlooked the testimony that such control as the Cleveland office has over the cars is for routing purposes only (C-m. 23342, p. 34) and that the Cleveland office is a record office only and has nothing to do with the marketing business nor with the control of tank cars. (C-m. 23218, p. 58).

It also has overlooked the fact that taxes were imposed and paid on the cars in seventeen states of the Union, in [fol. 95] all but two of which the tax is upon an ad valorem basis (C-m. 23342, pp. 16, 17; C-m. 23334, pp. 59, 60; C-m. 23334, p. 25).

III

The cars are not an integral part of the refinery, which is a local business, and the functions of which are confined solely to the manufacture of refinery products, wholly independent of the ownership and use of tank cars. The sole function of the cars is transportation, it being immaterial who manufactures or produces the commodity transported. Being owned by a non-resident, they cannot be taxed in Oklahoma. Section 9583, C. O. S. 1921.

IV

The Court has overlooked the very serious consequence of its decision that the entire fleet of cars is taxable in and

by Pawnee County. The cars are the instrumentalities and means by which a foreign marketing business is carried on in states other than Oklahoma. The same instrumentalities are subject to such tax as the respective states in which they enter to transact the busines of their owner may impose, and have in fact imposed, in the exercise of a right recognized by the Supreme Court of the United States. To tax the entire fleet in Oklahoma is to infringe upon the freedom of commerce, being practically a denial of the right of the company to engage in interstate busi-
[fol. 96] ness and to import merchandise, by means of these cars, into other states, and, in effect, denies the right of such other states to exercise the same privilege accorded to the State of Oklahoma, if it sees fit to exercise it.

V

The case of Prairie Cattle Co. v. Williamson, 5 Okl. 488, cited in the opinion, is not, we submit, in point. In that case cattle of the Prairie Cattle Company, evidently a non-resident, were found in Beaver County, Oklahoma, into which they had drifted from another range. The number of such cattle in Beaver County, grazing there in the year 1895, was estimated to be six hundred. The decision that the cattle were taxable in Beaver County rested upon a special statute providing that "whenever any live stock shall be located in this territory for the purpose of grazing it shall be deemed to have acquired an actual situs there for the purposes of this act," and which was an act providing for taxation of personal property "located in any county of this territory after the first day of March of any year, which shall acquire an actual situs therein before the first day of September." The court held that the legislature had authority to give such cattle a taxable situs. We submit, therefore, that the decision is inapplicable to the record in these cases as an authority on the question of actual situs, as distinguished from a legislative situs.
[fol. 97] We submit, therefore, upon the facts, that the tax assessed is beyond the power of the state to impose, and upon property not within its jurisdiction, is an infringement upon the freedom of commerce, places an undue burden upon interstate commerce and violates the Fourteenth Amendment to the Constitution of the United States.

For the foregoing reasons, and in view of the tax assessments on the property amounting to over a million dollars and entailing a heavy burden of taxation, and in view of the important questions involved, and the far reaching effect of the decision, we earnestly request a rehearing and reconsideration of these cases.

Chas. Y. Freeman, McCullum & McCullum, West & Davidson, Attorneys for Johnson Oil Refining Company.

[fol. 98] IN SUPREME COURT OF OKLAHOMA

23218, 23219, 23334, 23342

ORDER DENYING PETITION FOR REHEARING—Jan. 31, 1933

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause be, and the same is hereby, denied.

Swindall, J., dissents.

[fol. 99] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

(Consolidated)

DISSENTING OPINION ON REHEARING—Filed Jan. 31, 1933

SWINDALL, J., dissenting:

An opinion was rendered in these consolidated causes by this court on the 20th day of December, 1932, with which I cannot agree.

The Johnson Oil Refining Company is a corporation organized under the laws of the State of Illinois engaging in the business of refining and selling petroleum products. To facilitate its business it maintains and operates a fleet of approximately 381 railroad oil tank cars. By the use

of them the Johnson Oil Refining Company transports refined products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this state. Sometimes the company purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked "Johnson Oil Refining Company, Cleveland, Oklahoma," and "When empty return to Johnson Oil Refining Company, Cleveland, Oklahoma." The empty cars are, unless diverted by special order as aforesaid, returned to Cleveland. Repair trackage is maintained at Cleveland [fol. 100] which accommodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other trackage at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. Throughout the year the company has an average of approximately 64 cars per day at Cleveland, Pawnee County, Oklahoma, and an average of approximately 50 cars per day at Osage, Osage County, Oklahoma, where incoming and outgoing cars are held by the railroad company when congestion occurs at the refinery and when economical railroading requires. The remainder of the 381 cars are outside the State of Oklahoma in various other states. The cars move in sixteen states. This company maintains an office in Chicago where its officers having ultimate executive control reside. But, no trackage for cars is maintained in Chicago. Cleveland is the one place where the company always has use for these cars. All of the cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products are the result of sales contracts made from the office in Chicago, Illinois. The superintendent of transportation for the refinery lives in Cleveland and that office has control and supervision over the cars. No tax is paid on these cars in Oklahoma. A capital stock tax is paid in Illinois and they are taxed as personal property in several of the states in which they travel.

Upon these facts the opinion delivered in the causes held, first, that none of the cars were taxable in Osage County, Oklahoma, and, second, that the entire fleet of 381 cars were taxable in the State of Oklahoma in Pawnee County on

the theory that all of them had their situs at that place in this state. It is from this latter proposition that I dissent. The tax sustained by the opinion is clearly a direct tax upon tangible personal property a large proportion of which is constantly outside the State of Oklahoma, although the spe- [fol. 101] cific items of property making up the whole are regularly in and out of the state. It is my opinion that a tax so laid is a violation of the 14th Amendment to the Constitution of the United States, that the State of Oklahoma is taxing property outside its jurisdiction.

Mobilia sequuntur personam was a well established maxim of the common law, and the situs of personal property of every description, wherever it was actually kept or located, was held to be at the domicil of the owner and the property was subject to the jurisdiction of the owner's sovereign. 26 R. C. L. p. 273-4, citing St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 U. S. (L. Ed.) 192, and Sangamon, etc., R. Co. v. Morgan County, 14 Ill. 163, 56 Am. Dec. 497. It is said that this doctrine grew up when most personal property was of a nature which was kept close to the person of the owner, was small in amount, and was seldom removed from one jurisdiction to another without the removal also of its owner. In recent times, with the growth of modern industry and transportation, an extraordinarily large body of tangible and intangible personal property has arisen which has its location and ownership entirely independent of the domicil of the owner. In response to this situation the doctrine of location for taxation of personal property has changed.

One of the earlier cases noting the weakness in the fiction mobilia sequuntur personam and pointing to actual situs as the proper place for taxation was Hoyt v. The Commissioners of Taxes, 24 N. Y. 224. In that case the court said:

"It is said, however, that personal estate by a fiction of law has no situs away from the person or residence of the owner, and is always deemed to be present with him at the place of his domicil. The right to tax the relator's property situated in New Orleans and New Jersey rests upon the universal application of this legal fiction; and it is accordingly insisted upon as an absolute rule or principle of law which, to all intents and purposes, transfers the

property from the foreign to the domestic jurisdiction, and thus subjects it to taxation under our laws. Let us observe to what results such a theory will lead us. The nec- [fol. 102] essary consequence is, that goods and chattels actually within this State are not here in any legal sense, or for any legal purpose, if the owner resides abroad. They cannot be taxed here, because they are with the owner who is a citizen or subject of some foreign state.

* * * * * * *

"Accordingly there seems to be no place for the fiction of which we are speaking, in a well adjusted system of taxation. In such a system a fundamental requisite is that it be harmonious. But harmony does not exist unless the taxing power is exerted with reference exclusively either to the situs of the property, or to the residence of the owner. Both rules cannot obtain unless we impute inconsistency to the law, and oppression to the taxing power. Whichever of these rules is the true one, whichever we find to be founded in justice and in the reason of the thing, it necessarily excludes the other; because we ought to suppose, indeed we are bound to assume, that other States and Governments have adopted the same rule."

The law in this country seems to have developed consonant with the thought contained in that opinion. The Supreme Court of the United States has definitely and unequivocally established the principle that tangible personal property is taxable at its actual situs. Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077, and cases cited post. See also Prairie Cattle Co. v. Williamson, 5 Okl. 488, 49 Pac. 937. It holds to the view that taxation by a state of such property having a situs outside its boundaries is a violation of the 14th Amendment to the Constitution of the United States. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 195, 50 L. Ed. 150. On the other hand, in the field of intangible property the law in most cases, depending upon the circumstances, still holds to the doctrine that such property is taxable at the domicil of the owner. In the Union Refrigerator Transit Co. v. Kentucky case, supra, Mr. Justice Brown, delivering the opinion of the court, said:

[fol. 103] "Respecting this, there is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim mobilia sequuntur personam, and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the state where the property is retained. Such have been the repeated rulings of this court. (Citations:)

"If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the state of the domicil or the situs. * * *"

See 26 R. C. L. p. 282; Notes, 56 Am. Dec. 527, L. R. A. 1915C 914.

The property involved in the case at bar is tangible personalty and would ordinarily fall under the rule which taxes such property at its situs irrespective of the domicil of the owner. However, a prerequisite to the taxation of such property at its situs is that it have a situs, and this property is of a class which in its nature is mobile and may, therefore, move from place to place with such rapidity that it is extremely difficult to assign to it a definite location. While the sovereign has certain jurisdiction over every chattel situated within its territory, not every chattel which happens to be so situated can be regarded as having a taxable situs there. A chattel merely temporarily within the limits is not subject to the ordinary property tax. It must have become identified with the jurisdiction [fol. 104] as a part of its property. See Commonwealth v. Union Pac. R. Co., 214 Ky. 339, 283 S. W. 119, 49 A. L. R. 1091; Kelley v. Rhoads, 188 U. S. 1, 47 L. Ed. 359, 23 Sup. Ct. Rep. 259; Robinson v. Longley, 18 Nev. 71, 1 Pac. 377; Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091; Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup.

Ct. Rep. 475; and the cases regarding vessels cited post.

The Supreme Court of the United States has dealt with the problem of jurisdiction to tax this type of property a number of times and a review of some of the decisions sheds much light upon the solution. We are, of course, bound in the present case by its decisions.

In dealing with property of this sort that court has sanctioned the taxation of the fixed value of such property continuously within the state during the taxing period by any method which fairly arrives at that value, although the individual units thereof are constantly changing and are not, as such, identified with the jurisdiction. In Union Tank Line Co. v. Wright (1919) 249 U. S. 275, 63 L. Ed. 602, the court, in considering the proper measure of value for taxation of railway tank cars used in and out of a non-domiciliary state, said:

"A state may not tax property belonging to a foreign corporation which has never come within its borders; to do so under any formula would violate the due process clause of the 14th Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value, along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just, it need not be limited to mere worth of the articles considered separately, but may include as well 'the tangible value due to what we have called the organic relation of the property in the state to the whole system'. How to appraise them fairly when the tangibles constitute a part of a going concern operating in many states often presents grave difficulties; and absolute ac- [fol. 105] curacy is generally impossible. We have accordingly sustained methods or appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (Western U. Teleg. Co. vs. Atty. Gen. (1888) 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. Rep. 961), and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. v. Hall (1899) 174 U. S. 70, 43 L. Ed. 899, 19 Sup. Ct. Rep. 599). But if the plan pursued is arbitrary, and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the 14th Amendment, or both. Western U.

Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Marye v. Baltimore & O. R. Co., 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26, 35 L. ed. 613, 617, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, s. c. 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 44 L. ed. 708, 20 Sup. Ct. Rep. 631; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453, 62 L. ed. 827, 829, 38 Sup. Ct. Rep. 373."

Two of the cases cited above, American Refrigerator Transit Co. v. Hall (1899) and Union Refrigerator Transit Co. v. Lynch (1900), consider specifically the taxation of cars similar to those involved in the present case by a non-domiciliary state. In these cases the facts are essentially the same. In each the owner was engaged in supplying cars to shippers wherever needed; the cars were not confined to any particular route; were run indiscriminately over the lines of railroad over which consignors of freight shipped in such cars choose to route them; had no regular intervals nor any regular number; were engaged solely in interstate commerce; and when in the state were only transiently present. The average number within the state dur- [fol. 106] ing the taxing period in the Lynch case was ten cars per day. That case relied heavily upon the authority of the Hall case in which the court said:

"It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimately for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisement and

valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid. Marye v. Baltimore & O. R. R. Co., 127 U. S. 123; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18."

The same question was presented in Germania Refining Co. v. Fuller, 245 U. S. 631, 62 L. Ed. 521 (181 Mich. 618) wherein the cars were oil tank cars and the court affirmed the case by memorandum opinion upon the authority of the two cases supra. See also Prairie Cattle Co. v. Williamson, supra, where the Oklahoma Territorial Court sustained a tax on the average theory.

After the decisions in these two cases the question of the power of the domiciliary state to tax the same character of property was presented in the case of Union Refrigerator Transit Co. v. Kentucky (1905) 199 U. S. 195, 50 L. Ed. 150. In that case the cars were employed by the company by renting them to shippers, who took possession of them from time to time at Milwaukee, Wisconsin, and used them for the carriage of freight in the United States, Canada, and [fol. 107] Mexico. The domiciliary state, Kentucky, taxed the entire fleet of 2,000 cars for the years 1897, 1898, 1899, and 1900. During those years the average number of cars used in Kentucky per day was 28, 29, 40, and 67, respectively. The court treated the tax as one upon "tangible personal property permanently located in other states," and held the same invalid on the ground that the domiciliary state had no power to tax such property. The opinion indicated, however, that Kentucky could have taxed the average used within its borders. It said:

"We are of opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion."

No intimation was made, or needed, with respect to where the excess cars were taxable.

Following this case within less than a year the court again passed upon the power of the domiciliary state in the case of New York C. & H. R. R. Co. v. Miller (1906) 202 U. S. 584, 50 L. Ed. 1155. There the state of New York taxed all of the rolling stock of a railroad company although a considerable proportion of it was constantly outside the limits of the state. The relator contended that the proportion constantly outside should be deducted from the New York tax. No showing was made that any specific items were used continuously and exclusively outside of the state during the whole tax year; the court specifically assumed that none were. The court referred to the cases limiting the power of the domiciliary state to tax, including Union Refrigerator Transit Co. v. Kentucky, supra, then said:

"But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every [fol. 108] item of that property should be taken successively into another state for a day, a week, or six months, and then brought back."

Again, in answer to the contention that the present case was but the complement of those cases holding such property taxable in non-domiciliary states, the court said:

"In the present case, however, it does not appear that any specific cars of any average of cars was so continuously in any other state as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads."

A consideration of these cases, together with the history of the law on this subject, elucidates some of the principles governing the decisions. When the industrial revolution increased enormously the body of tangible and intangible personal property the maxim mobilia sequuntur personam was already established and the courts followed it until the necessity of taxing personalty at its actual situs became obvious. They then departed from the maxim in favor of the situs, but for the latter to apply the property must have become identified with a jurisdiction other than that of its owner. There remained a class of property for which no

situs could be definitely defined. A strong feeling has constantly obtained that no thing of value should escape taxation altogether. So, in such cases, the courts have retained the domiciliary theory. This, it seems, should alleviate the necessity of a court seeking out the most definite of several elusive possible situses and oblige it to uphold a tax only when the property has a defined situs within the taxing jurisdiction. Complementary action of other states should equalize the burdens. Property difficult of location has frequently been held taxable in two states. While the courts have not exhibited squeamishness at this situation, they have, nevertheless, tried on the whole to develop a harmonious system. With respect to property similar to that [fol. 109] involved herein Mr. Justice Lurton in Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. Ed. 96, expressed the feeling of difficulty of taxing at the situs as follows:

"To lay down a principle that vessel property has no situs for purposes of taxation other than that of actual permanent location would introduce elements of uncertainty concerning the situs of such property not presented by other kinds of movable property."

Such a principle would lead to conflicts in taxation between states and disrupt the harmony of the taxing system as a whole. Unfortunate individuals engaged in legitimate trade between states would suffer hardship. Under certain circumstances the courts have applied the theory of fixed value with changing identity. The items of property do not have a situs within the state but the fixed value is always present. In fairness to that state it should be taxable. Yet, it would be a violation of the very principle upon which the theory is set if the state were allowed to tax a greater amount than the value existing within its borders or to tax where no fixed value really exists. It seems that the minimum should be where there is sufficient average continuously used within the state so that it may be said that the average value is identified with the jurisdiction and the maximum should include only that value. Random excursions of cars into a state in insufficient quantity or with insufficient continuity to create a fixed value identified with the jurisdiction should not justify a tax. In harmony with the feeling that all property should be taxed somewhere such property should be taxed at the domicil of the owner. See New York C. & H. R. R. Co. v. Miller, supra.

In the present case I have no doubt that the average value of the property used in this state is taxable herein. On the other hand, it seems clear that under the decisions cited above much of this property was properly taxable in states other than Oklahoma and another part of it probably had no such definite location as to be taxable at its situs at all. If Oklahoma sustains a tax upon all of the property it has violated the interests of harmony in the taxation of such property. The same is true even if we hold that each item of property has an actual situs in this state, though I do [fol. 110] not say that it would not then all be taxable here. But, I do feel that such consideration should make us reluctant to find that situs. Again, with respect to such part as perhaps has no taxable average elsewhere, we should not try to import a situs by any forced conceptions, on the theory that the most definite situs is in this state, but should yield to the domiciliary jurisdiction.

It is my opinion that each unit of the property involved in this case, that is, each tank car, cannot upon analysis be held to have an actual situs in the State of Oklahoma. Each car came into and went out of the state during the taxing period. It stayed at the refinery from 24 hours to 10 days each trip. And there were always a greater number out of the state than in its boundaries, so each car must have remained outside the state considerably longer than it did inside. The fact that the cars were used to transport the products of the refinery at Cleveland, that all other points to which they went were haphazard, that they were returnable when empty to Cleveland, that the company repaired them there and maintained storage tracks for them at that place, and that they were always in demand at Cleveland only, does not seem to me sufficient to establish their situs in toto in Oklahoma. These facts are but evidentiary of the essential factor—that each car is as a whole identified with this jurisdiction. There remains the company's purpose to, and the fact that it did, use these cars widely in interstate commerce, that the cars were in fact employed more out of the state than in it. Purpose coupled with action seems to be the controlling principle in assigning a situs to chattels. See Delaware, L. & W. R. Co. v. Pennsylvania, Kelly v. Rhoads, Robinson v. Longley, Brown v. Houston, and Coe v. Errol, all cited supra.

Some of the cases most closely in point in the present situation are the cases decided in the Supreme Court of the United States concerning the situs for taxation of [fol. 111] vessels. In the case of Hays v. Pacific Mail S. S. Co. (1855) 17 How. 596, 15 L. Ed. 254, California laid a tax upon ocean-going vessels. They were owned by a New York corporation and operated by way of Panama to San Francisco, California, and points in the Territory of Oregon. The ships operated on schedule and were in each port long enough to transact their business there. After discharging at San Francisco they proceeded to Benicia, California, where the company maintained a naval dock and a ship-yard for its ships to put in when not otherwise engaged, for repairs, and to await the commencement of the next voyage, usually ten or twelve days. The court held that these ships had no situs for taxation in California.

In Morgan v. Parham (1873), 16 Wall. 471, 21 L. Ed. 303, the vessel operated on a schedule between Mobile, Ala., and New Orleans, La., touching each port about three days per week. The ship was owned by a resident of New York and was registered in that State. The captain resided in Mobile and a superior agent resided in New Orleans. The ship never went into other waters. The court held the ship, together with others in the same situation, had no situs for taxation in Alabama, and said that such situs was in New York.

In 1905, in Old Dominion S. S. Co. v. Virginia, 198 U. S. 298, 49 L. Ed. 1059, the court held that a ship on navigable waters operating wholly within the state of Virginia but engaged in interstate commerce, had a situs for taxation in that state.

In 1906 it decided Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 50 L. Ed. 1082, wherein vessels and barges operated on inland waters. They were owned in Illinois, had "Paducah, Kentucky" painted on their stern, and when not in use were kept in Paducah. The court held that they had no situs for taxation in Kentucky.

When one compares these cases with the facts in the case at bar it seems to me that we cannot escape the conclusion that each of these cars used into and out of the state of [fol. 112] Oklahoma did not have its taxable situs in this state.

For the foregoing reasons I am of the opinion that the State of Oklahoma has no jurisdiction to tax the entire

number of 381 cars owned by the Johnson Oil Refining Company and that a tax so assessed is a violation of the 14th Amendment of the Constitution of the United States. I, therefore, most respectfully dissent.

[fol. 113] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

CERTIFICATE OF COUNSEL—Filed Feb. 2, 1933

In connection with the motion of Johnson Oil Refining Company to stay mandate in the above entitled causes, I hereby certify that it is the bona fide intention of Johnson Oil Refining Company to prosecute an appeal from the decision and judgment of this Court in the above entitled causes to the Supreme Court of the United States, or to make proper application to said Court for a writ of certiorari, within three months from and after the overruling by this Court of the petition of Johnson Oil Refining Company for rehearing, and which petition was denied by said Court, and that I believe there is merit in said causes, and that the judgment of the Supreme Court of Oklahoma ought to be reversed by the Supreme Court of the United States.

Dated this 2d day of February, 1933.

A. A. Davidson, Counsel for Johnson Oil Refining Company.

[fol. 114] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

APPLICATION FOR STAY OF MANDATE—Filed Feb. 2, 1933

Now comes Johnson Oil Refining Company and moves the Court to enter an order staying and withholding the mandate, or mandates, in the above entitled causes, because

it is the bona fide intention of Johnson Oil Refining Company, within the time provided by law, to appeal from the decision of the Court to the Supreme Court of the United States, or to make application to said Supreme Court of the United States for a writ of certiorari, as movant may be advised as to the proper procedure.

Johnson Oil Refining Company, by Chas. Y. Freeman, McCollum & McCollum, West & Davidson, Its Attorneys.

[fol. 115] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

ORDER STAYING MANDATE—Filed Feb. 4, 1933

Motion of Johnson Oil Refining Company for a stay of the mandate herein came on to be heard *heard*:

On consideration whereof, it is now here ordered by the Court that no mandate of this Court issue in the above entitled and consolidated causes until April 1, 1933, and that if within said time Johnson Oil Refining Company shall have perfected an appeal to the Supreme Court of the United States, or if there is filed with the clerk of this Court a certificate of the clerk of the Supreme Court of the United States that a petition for certiorari and record have been filed in that Court, the stay hereinabove granted shall continue until the final decision of said causes in the Supreme Court of the United States.

Done by order of Conference.

Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma.

[fol. 116] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

No. 23342

[Title omitted]

PETITION FOR APPEAL—Filed March 16, 1933

Now comes petitioner and appellant, Johnson Oil Refining Company, a corporation organized and existing under

and by virtue of the laws of Oklahoma, and represents that on the 20th day of December, 1932, a judgment was [fol. 117] rendered by the Supreme Court of Oklahoma in the above entitled and numbered causes, as a consolidated cause, in which it avers errors were committed to its prejudice, all of which will more fully appear from the following assignment of errors;

Wherefore petitioner and appellant, considering itself aggrieved by said judgment, prays that it be allowed an appeal therefrom to the Supreme Court of the United States, in order that the errors so complained of may be corrected.

Assignment of Errors

Now comes the appellant above named, and filing herewith its petition for appeal, says that in the record and proceedings, and in the decision in the above entitled cause, manifest error has intervened to the prejudice of your petitioner, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment of errors:

1. The Supreme Court of Oklahoma in its judgment construing the statute of the State of Oklahoma, Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921) under which the case of the appellant had been held taxable by the State Taxing Authorities, so as to bring within its provisions as to taxability the property in question belonging to the appellant, committed error, in that the statute as so construed by the Supreme Court of Oklahoma is repugnant to the Constitution of the United States, particularly the Fourteenth Amendment thereto.

[fol. 118] 2. The Supreme Court of Oklahoma in its judgment construing the statute of the State of Oklahoma, Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921) under which the cars of the appellant had been held taxable by the State Taxing Authorities, so as to bring within its provisions as to taxability the property in question belonging to the appellant, committed error, in that the statute as so construed by the Supreme Court of Oklahoma deprives the appellant of its property without due process of law in contravention of the provisions of the Fourteenth Amendment of the Constitution of the United States.

3. The Supreme Court of Oklahoma erred in reversing the judgment of the District Court of Pawnee County, Oklahoma, which held that the tax imposed by the taxing officials of Pawnee County, Oklahoma, in appellant's entire fleet of cars was a taking of property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Oklahoma erred in holding that the assessment of a tax by the taxing officials of Pawnee County, Oklahoma, on the entire fleet of cars of appellant, an Illinois corporation having its principal office and place of business in Chicago, Illinois, was within and authorized by the statute of Oklahoma (Sec. 1, Ch. 44, Session Laws 1915, p. 64) providing that all property in the State of Oklahoma, except such as is exempt, shall be subject to taxation, and that said statute as so construed was not in- [fol. 119] valid or repugnant to the Constitution of the United States and the Fourteenth Amendment thereof.

5. The Supreme Court of Oklahoma erred in holding and deciding that the entire fleet of cars had, within the meaning of the statute an actual taxable situs in the State of Oklahoma, notwithstanding that the cars came into Oklahoma for the sole and only purpose of receiving a load of refinery products for transportation out of the state, and were only temporarily in the state for such purpose, and notwithstanding that none of the cars was kept, laid up, or stored in Oklahoma, but, except for short and unavoidable delays, all the cars were continuously in transit in interstate commerce.

6. The Supreme Court of Oklahoma erred in holding and deciding that appellant's entire fleet of cars was taxable in Pawnee County, Oklahoma, notwithstanding the fact that more than 300 cars of the fleet were, during the years for which the tax was imposed, continuously absent from the state (not the identical cars, but on an average), engaged in the marketing business of the appellant in other states, in which states the cars so engaged in business were taxed.

7. The Supreme Court of Oklahoma erred in holding and deciding that the appellant's entire fleet of railroad tank cars, employed and used by it in the transportation of refinery products out of Oklahoma to not less than 17 other

states, for sale there, or in delivery to purchasers in such states, and in which states the cars habitually entering therein for such purposes were taxed, was nevertheless taxable in the State of Oklahoma as an entirety, and that [fol. 120] such tax was not in violation of the Constitution of the United States, and did not contravene the Fourteenth Amendment thereof.

8. The Supreme Court of Oklahoma erred in refusing to hold and decide that appellant's fleet of cars, shown to have been constantly employed, and in movement, in interstate commerce during the years for which they were assessed, did not and could not thereby acquire an actual situs for taxation in the State of Oklahoma.

Prayer for Reversal

By reason whereof, and for which errors petitioner and appellant, Johnson Oil Refining Company, prays that the judgment and decision of the Supreme Court of Oklahoma be reversed and judgment rendered in favor of the said appellant, and for costs.

Chas. Y. Freeman, J. A. McCollum, Preston C. West, A. A. Davidson, Attorneys for Appellant, Johnson Oil Refining Company.

[fol. 121] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

No. 23342

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 16, 1933

The appellant in the above cause having prayed for the allowance of an appeal in the above entitled consolidated cause to the Supreme Court of the United States from the final judgment made and entered therein by the Supreme Court of Oklahoma on the 20th day of December, 1932 (pe-[fol. 122] tition for rehearing having been duly filed and thereafter denied on January 31, 1933), and from each and every part thereof, and having presented and filed its petition for appeal, and its assignment of errors with prayer

for reversal, and upon due consideration thereof and of the record in said consolidated cause:

It is ordered that said petition for appeal be, and is hereby granted, and that an appeal from the judgment of the Supreme Court of Oklahoma in said causes be, and is hereby, allowed, to the Supreme Court of the United States, upon petitioner filing an appeal bond in the sum of one thousand dollars, with sufficient sureties, and conditioned that appellant shall prosecute its said appeal to effect, and answer all costs if it fails to make good its said plea.

It is further ordered that the Clerk of the Supreme Court of Oklahoma shall prepare and certify a transcript of the record, and transmit the same to the Supreme Court of the United States.

The said appellant now presenting a bond in the sum of one thousand dollars, with United States Fidelity and Guaranty Company as surety, it is ordered, that the said bond be, and the same is hereby, approved.

In witness whereof I have set my hand this 16th day of March, 1933.

Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma.

Attest:

Gus Pool, Clerk Sup. Ct., by Reuel Haskell, Jr., Dep.
(Seal.)

[fols. 123-124a] Bond on appeal for $1,000, approved and filed March 16, 1933, omitted in printing.

[fol. 125] [File endorsements omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ACKNOWLEDGMENT OF SERVICE—Filed March 21, 1933

To The State of Oklahoma ex rel. C. E. MITCHELL, County Attorney of Pawnee County, Oklahoma, and The Board of County Commissioners of the County of Pawnee, Oklahoma:

There is hereby served upon you, as appellees, by copies thereof, the petition for appeal by Johnson Oil Refining

[fol. 126] Company, the assignment of errors filed therewith, and the order allowing appeal, in the above entitled cause.

J. A. McCollum, C. C. McCollum, A. A. Davidson, Attorneys for Appellant.

Service of the foregoing is hereby acknowledged this 18th day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for Appellees.

[fols. 127–170] Citation in usual form showing service on W. T. Cleeton and E. W. Clark filed March 21, 1933, omitted in printing.

[fols. 171–189] IN COUNTY COURT OF OSAGE COUNTY, STATE OF OKLAHOMA

No. 1575

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

Statement of Evidence.

[fols. 190 & 191] Thereupon G. C. LILLY, of lawful age, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testifies as follows:

Examination.

Mr. Pearson:

Q. You may state your name.

A. G. C. Lilly.

Q. Where do you reside, Mr. Lilly?

A. 200 Wood ——, Wilmette, Illinois.

Q. What business are you in?

A. I am Secretary-Treasurer of the Johnson Oil Refining Company.

Q. Does the Johnson Oil Refining Company have a refinery at Cleveland, Oklahoma, Pawnee County?

A. They do.

Q. Does it transact any of its business from that place?

A. Manufactures petroleum products at the plant.

Q. Does it have a sales department or a traffic department located there?

A. A local sales department and a traffic department.

[fol. 192] Q. Are you familiar with the manner conducting the yards at the refinery?

A. Yes, in general.

Q. How many cars will that yard there in the refinery accommodate?

A. There are 65 loading spots.

Q. There are 65 loading spots—are there any spots besides the loading track whereby you might store cars until you can pick them up to put on the loading spots?

A. Yes, there is a track, a rip track which accommodates 12 cars in all.

Q. The total capacity of the cars there at Cleveland amounts to around 80 cars, is that right?

A. That's right.

Q. How many cars do the Johnson Oil Refining Company possess at this time?

[fols. 193 & 194] A. At this time we own 385 cars.

Q. Your petroleum—Mr. Davidson stated it took 24 hours to load a car, is that true?

A. That's right.

Q. Or approximately 24 hours—does your output run around 65 cars a day?

A. No, I think that's too high perhaps in the neighborhood of 35 cars or 40 cars a day.

Q. Then, at the best the most cars you can accommodate is 80, is it?

A. Yes.

[fol. 195] Examination.

The Court:

Q. Does the Johnson Oil Refining Company use any tank cars belonging to other concerns to ship their products out?

A. We do, yes.

Q. Do other refineries use your cars to ship out their products?

A. Only when we have purchased material from those refineries and when we send our own cars there to get the [fol. 196] material we buy from them.

The Court: I believe that's all I have.

Mr. Pearson: Let me ask him.

Examination.

Mr. Pearson:

Q. Your men buy for the refinery raw material and market petroleum products?

A. Our main business is marketing petroleum products.

Q. You are not a public service corporation, are you?

A. No.

Examination.

Mr. Davidson:

Q. How long have you been in the marketing business?

A. It was a partnership, four brothers, in June 1909—been in the marketing business since that time.

Q. When was the company organized?

A. When?

Q. Yes.

A. January, 1914.

Q. In Illinois?

A. In Illinois.

Q. And during all that time you have been in the marketing business?

A. Yes.

[fol. 197] Q. You had no refinery until 1922?

A. That's right.

Q. Where do you get your merchandise for marketing?

A. Practically all refineries in the United States here where we can buy advantageously.

Q. Do you still buy merchandise?

A. Yes.

Mr. Pearson: Objected to as incompetent, irrelevant and immaterial, and improper cross examination.

The Court: He has answered. Overruled.

Q. Where is that merchandise shipped, both what you buy and what you manufacture and what you sell?

A. Well, we have about 165 bulk storage distributing stations in Illinois, Indiana, Missouri, Ohio and Wisconsin.

Mr. Pearson: We will admit that those cars are used in inter-state commerce.

Q. That is your own bulk stations?

A. Yes.

Q. Do you also sell gasoline to other stations?

A. Yes sir.

Q. And you serve your own bulk stations?

A. Yes sir.

[fol. 198] Q. Can you tell, Mr. Lilly, what portion of the refined products manufactured at Cleveland are shipped or sold to other states?

A. Well, it is about 99 per cent, plus.

Q. Very small quantity is sold in Oklahoma?

A. Yes sir.

Q. Where is the marketing business of the company conducted?

A. In Chicago.

Q. During all the years mentioned was it conducted there in Chicago?

A. Well, until, prior to 1920 the headquarters was in Chicago Heights.

Q. That is in Illinois, anyway?

A. Yes sir.

Q. Your office then was moved into the City of Chicago?

A. Yes.

Q. Did your company then own tank cars to take care of its marketing business?

A. No, we first bought——

Q. When did you first own tank cars?

A. We bought 20 tank cars in 1918.

Q. And you have increased the number since that time?

[fols. 199–201] A. Yes.

Q. Are these cars always in use?

A. Practically all the time.

Q. All the time, always in movement?

A. Yes sir.

[fols. 202–210] Q. These cars then are used generally for the distribution of production, both purchased by other refineries and manufactured at Cleveland?

A. That's right.

Q. There are no cars set aside or assigned to the Cleveland refinery for that purpose only, are there?

A. No.

[fol. 211] Deposition of witness taken to be used in a matter pending before the County Treasurer of Osage County, to-wit, in the matter of the proposed assessment of omitted property of Johnson Oil Refining Company

In pursuance to the notice hereto attached, and at the time and place therein stated, the County of Osage appeared by C. K. Templeton, the County Attorney of Osage County, and J. A. McCollum and A. A. Davidson appeared on behalf of Johnson Oil Refining Company; and thereupon the said Johnson Oil Refining Company produced the following witnesses in order, to-wit:

O. W. CAMPBELL, of lawful age, who, being first duly sworn, deposeth and saith in reply to the interrogatories propounded, to-wit:

Direct examination.

By Mr. Davidson: It is stipulated and agreed by counsel for the respective parties that the signature of the witness may be waived and the deposition read at the hearing of the above matter with the same effect as if the witness had duly signed the same.

By Mr. Davidson:

Q. State your name Mr. Campbell?

A. O. W. Campbell.

Q. Where do you live?

A. At Denison, Texas.

[fol. 212] Q. Are you connected with the M. K. & T. Railway Company?

A. Yes sir.

Q. As to what capacity?

A. Superintendent Transportation Department, for the entire system.

Q. As such superintendent of such transportation do you have direction of the movement of what is known as tank cars on the system of the Katy?

A. Yes sir.

Q. Are you familiar with the fact that Johnson Oil Refining Company uses tank cars for transportation of tank products over the Katy system?

A. Yes sir.

Q. In shipping the products of the refinery from, say the State of Oklahoma to other states, do bills of lading accompany those various cars?

A. Yes sir.

Q. What direction does the railroad use with reference to returning empty cars?

A. We are obliged to follow instructions as given to the shipper.

Q. Do those instructions generally appear on the bill of lading?

A. Yes, sir.

Q. I assume that there are thousands of those cars on [fol. 213] the Katy Railroad daily?

Mr. Hall: Object to that as immaterial.

By the Court: Overruled.

Mr. Hall: Exception.

A. Yes sir.

Q. In returning empty cars to their destination is it possible at all times to return them without any stop on the journey?

Mr. Hall: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Hall: Exception.

A. It is not possible, no.

Q. Due to what?

A. Due to the general conditions of transportation and traffic conditions.

Q. I assume you make an effort to return them as speedily as possible, do you?

Mr. Hall: Object to that as incompetent, irrelevant and immaterial, calling for the conclusion of the witness.

The Court: Overruled.

Mr. Hall: Exception.

A. In view of those conditions, yes sir.

Q. If there are any stops or delays on the road, generally, [fol. 214] would you say whether they are avoidable?

A. In some cases they might be avoidable, in others they are unavoidable.

Q. You don't know, of course, do you Mr. Campbell, where these cars go on their various journeys with gasoline loads, to what states?

Mr. Hall: Object to that as incompetent, irrelevant and immaterial, calling for a conclusion of the witness and not the best evidence.

The Court: Overruled.

Mr. Pearson: Exception.

A. I don't know, with the billing that is offered in individual cases.

Q. If they are shipped to such states as Nebraska, Wisconsin, Minnesota, Ohio, Indiana, Illinois, and Michigan, at what point on your system would cars come back from connection roads to the Katy railroad?

Mr. Hall: Object to that as not the best evidence.

The Court: Overruled.

Mr. Hall: Exception.

A. Ordinarily, Kansas City and St. Louis.

Q. Now where, Mr. Campbell, would these various stoppages be made due to traffic conditions?

Mr. Hall: Object to that as incompetent, irrelevant and immaterial, not the best evidence, calling for the conclusion [fol. 215] of the witness.

The Court: Overruled.

John R. Pearson: Exception.

A. Ordinarily at the point where they are received, their immediate terminal or division point.

Q. Has the Katy any yards between St. Louis and Cleveland and between Kansas City and Cleveland, where cars could be sidetracked due to traffic conditions?

A. Yes sir.

Mr. Hall: Object to that as incompetent, irrelevant and immaterial, calling for the conclusion of the witness and not the best evidence.

The Court: Overruled.

Mr. Pearson: Exception.

Q. Do traffic conditions remain the same from day to day, or are there times when there is a flood of cars in a day?

Mr. Hall: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Pearson: Exception.

A. The traffic conditions vary almost daily.

Q. Where is the nearest yard on the Katy Railroad to Cleveland, Oklahoma?

Mr. Hall: Object to that as incompetent, irrelevant and immaterial, not the best evidence.

[fol. 216] The Court: Overruled.

Mr. Hall: Exception.

A. On the North at Osage, Oklahoma.

Q. How large a yard is that?

A. I can't tell you in car capacity, but it is of considerable size, that being a division point.

Q. Now, Mr. Campbell, when is an empty car delivered to Johnson Oil Refining Company?

Mr. Hall: Objected to as calling for a conclusion of the witness and not the best evidence.

The Court: Overruled.

Mr. Pearson: Exception.

A. When it is delivered it is by our local crews on the tracks of the Johnson Oil and Refining Company.

Q. You mean their own private tracks?

A. Their tracks.

Q. Does the Katy have any yard at Cleveland?

A. They have no yard in the ordinary sense of that term. We have a couple of tracks there which will possibly hold a hundred cars.

Q. Do you know, Mr. Campbell, whether the tank cars from Cushing Refinery are shipped to and returned on your line?

Mr. Hall: Objected to as immaterial.

The Court: Overruled.

[fol. 217] Mr. Pearson: Exception.

Q. Want to show the number of cars.

A. Yes sir.

Q. Now until the delivery of cars to the Johnson Oil Refining Company on its private tracks at Cleveland, who has possession, custody and control of the car?

Mr. Hall: Objected to as immaterial, calling for a conclusion of the witness and not the best evidence.

The Court: Overruled.

Mr. Pearson: Exception.

A. The railroad has possession of them and control in the sense that they are controlling the movement of them up to their destination.

Q. And at whose risk?

Mr. Hall: Objected to that as immaterial.

The Court: Overruled.

Mr. Hall: Exception.

A. At the risk of the railroad in case of damage or destruction of any car.

Q. Now if the private tracks of the Johnson Oil Refining Company are filled with cars, in process of loading—strike that out. Assuming that it takes on an average of twenty-four hours for a car after it reaches private tracks of the Johnson Oil Refining Company, to load and be delivered [fol. 218] back to the tracks of the Katy Railroad Company, and that during their period of twenty-four hours cars are enroute, where would they be held by your Company until such time as the Johnson Oil Refining Company had room for them on their track?

Mr. Hall: Object to that as immaterial, irrelevant and incompetent; not the best evidence, calling for a conclusion.

The Court: Overruled.

Mr. Pearson: Exception.

A. There is no particular point at which they might be held. The movement of the cars after we receive them at the principal junctions where they are received empty is ordinarily marshalled as nearly as they may be to fill the requirement of the shipper for loading.

Q. If that particular point should happen in any instance at the yards at Osage Junction and are delivered at that point temporarily pending their delivery to Johnson Oil Refining Company, does the Katy charge any storage or demurrage?

A. No sir.

Q. The traffic, do you know, can you state, Mr. Campbell, whether these traffic conditions require a stoppage of empty cars on the journey to their destination, does this apply to other roads besides the Katy road?

[fols. 219–330] Mr. Hall: Object to that as immaterial.

The Court: Overruled.

Mr. Pearson: Exception.

A. My experience in my transportation work assures me that they do.

Mr. Davidson: Take the witness.

[fol. 331] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PRÆCIPE FOR RECORD—Filed March 21, 1933

The Clerk of the Supreme Court of Oklahoma is hereby directed to prepare and certify a transcript of the record in the above entitled causes, for the use of the Supreme Court of the United States, by including therein the following:

1. Petition in error and case-made attached thereto as Exhibit "A" in Cause No. 23,342.
2. Petition in error and case-made attached thereto as Exhibit "A" in Cause No. 23,334.
3. Motion to consolidate causes.
4. Order of consolidation.
5. Minute of submission.
6. Minute of judgment.
7. Majority opinion of the Supreme Court.
8. Petition for rehearing.
9. Order denying petition for hearing.
10. Dissenting opinion of Justice Swindall on rehearing.

[fol. 332] 11. Motion for stay of mandate and certificate of counsel.

12. Order staying mandate.
13. Petition for appeal.

14. Assignment of errors.

15. Order allowing appeal.

16. Bond on appeal.

17. Service of petition for appeal, assignment of errors and order allowing appeal.

18. Citation and service thereof.

19. Statement in support of jurisdiction under Rule 12 of the Supreme Court of the United States, and service thereof.

20. This præcipe.

21. Certificate of Clerk.

J. A. McCollum, C. C. McCollum, A. A. Davidson, Attorneys for Johnson Oil Refining Company.

Service of the foregoing is hereby acknowledged this 18th day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for the Above-named Plaintiffs in Error.

[fols. 333-348] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

SUPPLEMENTAL PRÆCIPE FOR RECORD—Filed March 31, 1933

The Clerk of the Supreme Court of Oklahoma is hereby directed to include in the transcript of the record in the above entitled cause, in addition to the matters included in the original præcipe, the following:

Appellee's statement against jurisdiction under paragraph 3, rule 12, of the rules of the Supreme Court of the United States, and service thereof.

This præcipe.

J. A. McCollum, A. A. Davidson, Attorneys for Johnson Oil Refining Company.

Service of the foregoing is hereby acknowledged this 31 day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for the State of Oklahoma ex rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, and the Board of County Commissioners of the County of Pawnee, Oklahoma.

[fol. 349] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 350] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S DEFINITE STATEMENT OF THE POINTS UPON WHICH IT RELIES AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed April 7, 1933

[fol. 351] Statements of Points Relied On

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this cause are as follows:

Point 1. The statute of the State of Oklahoma, Section 9574 of the Compiled Statutes, 1921, providing:

"All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation,"

as construed and applied by the Supreme Court of Oklahoma in its judgment and opinion, and so as to bring within its provisions, as to taxability, appellant's fleet of cars, is repugnant to the Constitution of the United States in that it contravenes the Fourteenth Amendment thereto as depriving appellant of its property without due process of law.

Point 2. As, upon the undisputed facts, appellant, an Illinois corporation, was at all times engaged, in the State of its domicile, in the business of marketing refined petroleum products in interstate commerce; that the cars assessed were an investment in, and a facility of such busi-

ness; that they were at all times employed in commerce among the states; that they came to Oklahoma as an incident to such commerce, and were temporarily within the [fol. 352] borders of the state, for the sole purpose of receiving a load of refined petroleum products, principally at appellant's refinery in Pawnee County, Oklahoma, for transportation out of the state, and for delivery in other states, either to appellant's customers, or for sale at its own bulk stations maintained in a number of states; that each car was in the State of Oklahoma for such purpose, on an average, about two days per month; that more than four-fifths of the number of cars, on an average, were continuously out of the State of Oklahoma, employed in their owner's business in other states, and in which states they were taxed, and the taxes thereon were paid; and that as no part of the fleet of cars had ever been laid up or stored, the fleet of cars was not property within the jurisdiction of the State of Oklahoma for taxation purposes, and the assessment of the entire fleet contravened the Fourteenth Amendment to the Constitution of the United States, as claimed by appellant.

Point 3. The domicile of the owner, as an Illinois corporation, furnished, prima facie, the situs of its fleet of cars for the purpose of ad valorem taxation, and the fact that cars of the fleet came habitually to appellant's refinery in Pawnee County, Oklahoma, to be loaded with interstate merchandise for transportation out of the state, and for such purpose only, did not operate to change such situs, or authorize the taxing authorities in Oklahoma to assess a tax thereon, and such tax contravenes the Fourteenth Amendment to the National Constitution.

[fol. 353] Point 4. The continuous movement of appellant's cars, both within and without the jurisdiction of Oklahoma, in interstate commerce, and for the transportation of refinery products from Oklahoma to, and for the distribution thereof in, other states, cannot operate to fix a situs for the entire fleet at the location of appellant's refinery, or at any other place, in the State of Oklahoma.

Point 5. The judgment of the Supreme Court of Oklahoma that the taxable situs of appellant's fleet of cars was at its refinery in Pawnee County, Oklahoma is in conflict with the undisputed facts and the legal effect thereof, and

with the fundamental basis of taxation, and the assessment of a tax thereon deprived appellant of its property without due process of law.

Point 6. The legal situs of the cars at the domicile of appellant, and in other states where they are employed and where they have been taxed, presumably in proportion to the protection afforded them by the laws of such states, precludes, upon established principles of taxation, the right of Oklahoma to levy a tax upon the entire assessable value of the entire fleet, in that the State is not called upon to protect, and cannot, upon the undisputed facts, afford the protection of its laws to, the entire fleet.

Point 7. The Supreme Court of Oklahoma committed reversible error by its reversal of the judgment of the Dis-
[fol. 354] trict Court of Pawnee County, Oklahoma, and in thereby denying the claims of appellant to the rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States, and which claim of right the said District Court sustained.

Designation of Parts of Record to be Printed

The appellant states that it considers only the following parts of the record necessary for consideration of the points upon which it intends to rely:

Pages 1 to 8, both inclusive.

Beginning with page 22 print to and including line 19 on page 43, ending with "I am Superintendent of the North American Car Corporation", and (continuing the testimony of John Scheidel) beginning on the 3d line of page 44 with the question "Has your company made repairs on these cars?" to and including the 17th line on said page ending with the words "safety appliance repairs", and beginning on the 8th line of page 45 with the question "You stated that you had repaired several of the Johnson Oil Refining Company tank cars," to and including the 19th line of said page 45, ending with the answer "The Traffic Manager at Cleveland, Oklahoma."

Beginning with the 7th line on page 48 at the words "George A. Mindeman, next witness, etc.," and continuing to and including the 6th line of page 49, ending with the words "No, sir", and beginning at the top of page 51 and
[fol. 355] continuing to the bottom of page 52.

Beginning at the top of page 55, to and including page 57.
Beginning at the top of page 58, to and including page 60.
Pages 63 to 66, both inclusive.
Pages 71 to 78, both inclusive.
Pages 79 to 141, both inclusive.

(From Record in Supreme Court No. 23334, Appeal from Osage County)

Beginning at the top of page 190 to and including line 20 with the words "Traffic Department".

Beginning on line 7 of page 192 to and including line 11 of page 193 ending with the word "Yes".

Beginning at line 15 of page 195 with the words "Examination: The Court", to and including line 5 of page 199, ending with the words "Yes sir".

Beginning at line 7 page 202 with the words "These cars then are used, etc." and ending with the 13th line of the same page with the word "No".

Beginning with page 211 and continuing to and including line 6 of page 219.

Beginning on page 331 continuing to and including page 349.

[fol. 356] Respectfully submitted.

Chas. Y. Freeman, J. A. McCollum, Preston C. West, A. A. Davidson, Attorneys for Appellant.

We hereby acknowledge service, by copy, of the foregoing and agree thereto, this 31st day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel; J. Berry King, Attorney General of Oklahoma, by F. M. Dudley, Assistant Attorney General of Oklahoma, Attorneys for Appellees.

[fol. 357] [File endorsement omitted.]

Endorsed on cover: File No. 37,542. Oklahoma Supreme Court. Term No. 24. Johnson Oil Refining Company, appellant, vs. The State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, et al. Filed April 7, 1933. No. 24, O. T., 1933.

